6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2013-0534; FRL-9911-07-Region 9]

Approval and Promulgation of Implementation Plans; California; San Joaquin Valley; Contingency Measures for the 1997 $PM_{2.5}$ Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a State implementation plan (SIP) revision submitted by California that corrects deficiencies in the Clean Air Act (CAA) contingency measures for the 1997 annual and 24-hour national ambient air quality standards (NAAQS) for fine particulate matter ($PM_{2.5}$) in the San Joaquin Valley (SJV). Approval of this SIP revision lifts the CAA section 179(b)(2) offset sanctions and terminates the CAA section 179(b)(1) highway funding sanction clock triggered by the EPA's partial disapproval of the SJV SIP for attainment of the 1997 $PM_{2.5}$ NAAQS on November 9, 2011.

DATES: This rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGSITER]**.

ADDRESSES: You may inspect the supporting information for this action, identified by docket number EPA-R09-OAR-2013-0534, by one of the following methods:

Federal eRulemaking portal, *http://www.regulations.gov,* please follow the online instructions; or,

Visit our regional office at, U.S. Environmental Protection Agency Region 9, 75 Hawthorne Street, San Francisco, CA 94105-3901.

Docket: The index to the docket (docket number EPA-R09-OAR-2013-0534) for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region 9, 75 Hawthorne Street, San Francisco, California. While documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., voluminous records, large maps, copyrighted material), and some may not be publicly available in either location (e.g., Confidential Business Information). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed directly below.

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SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us" and "our" refer to the EPA.

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I. Background Information

On November 9, 2011, the EPA partially approved and partially disapproved the San Joaquin Valley $PM_{2.5}$ State Implementation Plan ("SJV $PM_{2.5}$ SIP") (76 FR 69896). The SJV $PM_{2.5}$ SIP

is California's plan for attaining the 1997 $PM_{2.5}$ NAAQS in the San Joaquin Valley.[1] Our partial disapproval of the SJV $PM_{2.5}$ SIP was based on our determination that its contingency measure provisions failed to meet the requirements of Clean Air Act ("CAA" or "the Act") section 172(c)(9), which require that the SIP for each $PM_{2.5}$ nonattainment area contain contingency measures to be implemented if the area fails to make reasonable further progress (RFP) or to attain the NAAQS by the applicable attainment date. *See* 76 FR 41338, 41357 to 41359 (July 13, 2011) (proposed partial approval and partial disapproval of SJV $PM_{2.5}$ SIP) and 76 FR 69896, 69918 to 69919 and 69924 (final partial approval and partial disapproval of SJV $PM_{2.5}$ SIP). The disapproval became effective on January 9, 2012, starting a sanctions clock for imposition of new source review offset sanctions 18 months after January 9, 2012, and highway sanctions 6 months after the imposition of offset sanctions, pursuant to CAA section 179 and our regulations at 40 CFR 52.31.

On July 3, 2013, CARB submitted the Contingency Measure SIP as a revision to the California State Implementation Plan. The Contingency Measure SIP addresses the SIP deficiencies identified in the EPA's 2011 partial disapproval of the SJV $PM_{2.5}$ SIP by (1) confirming that the SJV area had met its 2012 RFP milestones and (2) expanding upon the attainment contingency measures in the SJV $PM_{2.5}$ SIP to establish a contingency plan that achieves SIP-creditable emission reductions equivalent to approximately one year's worth of RFP in 2015. *See generally* Contingency Measure SIP. Among these SIP-creditable emission reductions are reductions from a contingency provision in the District's residential woodburning rule, Rule 4901, and reductions from the District's implementation of two incentive grant programs: the Carl Moyer Memorial Air Quality Standards Attainment Program ("Carl Moyer

[1] For a more detailed description of the SJV $PM_{2.5}$ SIP, *see* 76 FR 41338, 41339 to 41359 (July 13, 2011).

Program") and the Proposition 1B: Goods Movement Emission Reduction Program ("Prop 1B"). *Id.* at 4 and 6. A detailed description of the Contingency Measure SIP can be found at 78 FR 53113, 53115 (August 28, 2013).

On August 28, 2013, we proposed to approve the Contingency Measure SIP as correcting the deficiency in the SJV $PM_{2.5}$ SIP related to the attainment contingency measure requirement (78 FR 53113). At the same time, we also proposed to find, based on documentation in the Contingency Measure SIP, that the RFP contingency measure requirement in CAA section 172(c)(9) for the 2012 milestone year was moot because the SJV has achieved the emission reduction benchmarks for the 2012 RFP year. Our full evaluation of the Contingency Measure SIP and our rationale for finding that this SIP corrects the deficiencies in the SJV $PM_{2.5}$ SIP can be found in the August 28, 2013 proposed rule. Based on our proposed approval of the Contingency Measure SIP, we also issued on August 28, 2013, an interim final determination that stayed the imposition of the offset sanctions that became effective in the SJV on July 9, 2013 and tolled the sanctions clock for the imposition of the highway sanctions (78 FR 53038).

II. Public Comments and the EPA's Responses

The EPA provided a 30-day period for the public to comment on our proposed rule. During this comment period, which ended on September 28, 2013, we received four public comments. A copy of these comment letters can be found in the docket. We provide our responses to these comments below.

A. Comments regarding necessary types and quantities of contingency measure emission reductions

Comment 1: Earthjustice cites the D.C Circuit Court of Appeals' decision in *Natural Resources Defense Council* v. *EPA*, 706 F.3d 428 (D.C. Cir. 2013) (hereafter "*NRDC*") to support its claim that the Contingency Measure SIP cannot be approved under the CAA. Specifically, Earthjustice argues that the EPA's approval of the SJV $PM_{2.5}$ SIP was built upon the EPA's 2007 implementation rule for the 1997 $PM_{2.5}$ NAAQS (hereafter "2007 $PM_{2.5}$ Implementation Rule"),[2] which the *NRDC* court has since remanded for failure to comply with the requirements of subpart 4 of title I, part D of the CAA; that the SJV $PM_{2.5}$ SIP and the reasonable further progress (RFP) projections therein likewise fail to satisfy the applicable requirements of subpart 4; and that because the contingency measure obligation is based upon the RFP projections in the SJV $PM_{2.5}$ SIP, the Contingency Measure SIP is also flawed.

Earthjustice argues that the most significant defect in the SJV $PM_{2.5}$ SIP is that it assumes the maximum available attainment deadline without implementing best available control measures (BACM) under CAA section 189(b)(1)(B), and that because of this erroneous attainment date the RFP trajectory in the SJV $PM_{2.5}$ SIP provides for a 9-year attainment "glide path" that fails to comply with the CAA. Under subpart 4, Earthjustice argues, nonattainment areas relying on reasonably available control measures have four years to attain and thus have a contingency measure obligation of 25 percent of the total reductions required for attainment, rather than the one-ninth of total reductions provided in the Contingency Measure SIP. Alternatively, Earthjustice argues that had the SJV qualified for an extended attainment deadline under CAA section 188(b)(1), the District would have had to implement BACM, which would have provided

for steeper emission reductions than currently provided in the SJV $PM_{2.5}$ SIP which is based on the implementation of reasonably available controls.

[2] *See* "Clean Air Fine Particle Implementation Rule," 72 FR 20586 (April 25, 2007), codified at 40 CFR part 51, subpart Z.

Earthjustice further contends that because the SJV area has failed to attain the $PM_{2.5}$ standard by the "moderate" area deadline in subpart 4, a new plan with new controls and an attainment horizon that is less than 9 years is required. Earthjustice states that this new plan must include new RFP targets and contingency measures, and that the calculation of these targets will require more than one-ninth of the total reductions required, because the interval between the baseline for the serious area plan and the attainment deadline will be less than nine years. Thus, according to Earthjustice, "no matter how the SJV chooses to comply with subpart 4, there is no scenario in which the RFP trajectory and therefore the quantity of emission reductions required for contingency measures will match those calculated in the [SJV $PM_{2.5}$ SIP]."

Response 1: As a threshold matter, to the extent the commenter is challenging our November 2011 final action on the SJV $PM_{2.5}$ SIP based on the D.C. Circuit's January 2013 decision in *NRDC*, such a challenge may only be brought in the appropriate circuit court within specified timeframes under CAA section 307(b). Section 307(b)(1) provides, *inter alia*, that any petition for review of an EPA action in "approving or promulgating any implementation plan under [CAA section 110] * * * which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit" and must be filed "within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise." Our action today on the Contingency Measure SIP is not the appropriate forum for a challenge to our November 2011 final action on the SJV $PM_{2.5}$ SIP.

We nonetheless respond below to the substance of Earthjustice's claims. In *NRDC,* the U.S. Court of Appeals for the D.C. Circuit remanded the EPA's 2007 $PM_{2.5}$ Implementation Rule,[3] holding that the EPA erred in implementing the 1997 $PM_{2.5}$ standards solely pursuant to the general implementation provisions of subpart 1 of part D, title I of the CAA, without also considering the particulate matter-specific provisions of subpart 4. The court directed the EPA to re-promulgate the rule pursuant to subpart 4 of part D, title I of the Clean Air Act but declined to impose a deadline by which the Agency must do so. *See* 706 F.3d 428, 437 and n. 10. This decision has no bearing on our action on the Contingency Measure SIP.

Earthjustice's arguments rest on the premise that the *NRDC* decision necessarily invalidates our November 2011 final action on the SJV $PM_{2.5}$ SIP (76 FR 69896, November 9, 2011) and therefore renders flawed any assessment of contingency measure obligations derived from that plan. Nothing in *NRDC*, however, indicates the court intended to automatically invalidate other EPA rulemakings that were based in whole or in part on the 2007 $PM_{2.5}$ Implementation Rule. Indeed, the D.C. Circuit remanded but did not vacate the 2007 $PM_{2.5}$ Implementation Rule,[4] citing in its opinion (at 706 F.3d at 437 n. 10) a prior decision in which it held that "it is appropriate to remand without vacatur in particular occasions where vacatur 'would at least temporarily defeat…the enhanced protection of the environmental values covered by [the EPA rule at issue].'" *North Carolina v. EPA,* 550 F.3d 1176, 1178 (D.C. Cir. 2008). Our November 2011 final action on the SJV $PM_{2.5}$ SIP included approval of District commitments to adopt and

[3] The *NRDC* decision remanded both the 2007 $PM_{2.5}$ Implementation Rule and a separate rulemaking to implement the New Source Review permitting requirements for the 1997 $PM_{2.5}$ NAAQS. This latter rule is not at issue in this action.

[4] The 2007 $PM_{2.5}$ Implementation Rule therefore remains "on the books" while the EPA effects the required changes through one or more national rulemakings consistent with the *NRDC* decision.

implement specific control measures on a fixed schedule and State and District commitments to achieve specific amounts of NO_x, SO_x and direct $PM_{2.5}$ emission reductions by fixed dates. *See* 76 FR 69896, 69924 (November 9, 2011), codified at 40 CFR 52.220(c)(392) and (c)(395). Absent an EPA rulemaking to withdraw or revise this final rule, which *NRDC* does not compel, our final action on the SJV $PM_{2.5}$ SIP remains effective and these State and District commitments remain federally-enforceable requirements of the California SIP.[5] We therefore disagree with the commenter's assertion that the RFP projections in the SJV $PM_{2.5}$ SIP render the Contingency Measure SIP flawed.

Additionally, we do not believe that the *NRDC* court's January 4, 2013 decision should be interpreted so as to retroactively impose subpart 4 requirements on the state in the context of our action on this corrective SIP, as the timing and nature of the court's decision compound the consequences of disapproval based on such retroactive application here.[6] California submitted the various components of the SJV $PM_{2.5}$ SIP (and revisions thereto) between June 2008 and July 2011. On July 13, 2011, we proposed to approve all elements of the SJV $PM_{2.5}$ SIP except for its contingency measure provisions and described the specific deficiencies in the contingency measures that California would need to address in a corrective SIP submission in order to avoid

[5] To remove these commitments from the applicable SIP before the EPA has re-promulgated an implementation rule pursuant to subpart 4 consistent with the *NRDC* opinion would be to temporarily defeat the enhanced environmental protections provided by these federally-enforceable control obligations.

[6] In rulemakings on individual areas subsequent to the *NRDC* decision, the EPA has explained in detail its view that the court's recently announced interpretation should not be applied retroactively. *See, e.g.,* 78 FR 20856 (April 8, 2013) (proposed redesignation of Indianapolis to attainment for 1997 annual $PM_{2.5}$ standard) and 78 FR 41698 (July 11, 2013) (final redesignation of Indianapolis to attainment for 1997 annual $PM_{2.5}$ standard). The U.S. District Court for the District of Colorado recently agreed with the EPA's position that *NRDC* does not require retroactive application of Subpart 4 requirements. *See Wildearth Guardians v. Gina McCarthy,* Case No. 13-CV-1275-WJM-KMT (D. Colo., March 11, 2014) (dismissing plaintiff's claim that the EPA missed a non-discretionary deadline based on retroactive application of Subpart 4).

mandatory sanctions (76 FR 41338, 41358 to 41359, 41361, July 13, 2011). We finalized this partial approval and partial disapproval action on November 9, 2011, effective January 9, 2012, starting a sanctions clock for imposition of offset sanctions 18 months after January 9, 2012 and highway sanctions 6 months later, pursuant to CAA section 179(b) and the EPA's regulations at 40 CFR 52.31 (76 FR 69896, 69924, November 9, 2011) (final rule partially approving and partially disapproving SJV $PM_{2.5}$ SIP)).[7] We stated in the final rule that "[n]either sanction [would] be imposed under the CAA if California submits and we approve prior to the implementation of the sanctions, SIP revisions that correct the deficiencies identified in our proposed action." *Id.* California reasonably relied upon this statement to develop a SIP submission addressing the deficiencies identified in the July 2011 proposed action – i.e., a SIP submission containing contingency measures that achieve emission reductions equivalent to one year's worth of RFP, on a pollutant-specific basis, which are in excess of the emission reductions relied on for RFP and attainment in the SJV $PM_{2.5}$ SIP (76 FR 41338, 41358 to 41359, 41361, July 13, 2011).

Over a year later, on January 4, 2013, the D.C. Circuit issued its decision remanding the EPA's 2007 $PM_{2.5}$ Implementation Rule. By this time, just six months remained before mandatory offset sanctions would apply in the SJV under CAA section 179(b) unless the State submitted and we approved a SIP revision correcting the deficiencies that prompted the EPA's disapproval. On June 20, 2013, the District adopted the Contingency Measure SIP, which it had developed to address the deficiencies identified in the 2011 action on the SJV $PM_{2.5}$ SIP, and

[7] The disapproval also triggered an obligation on the EPA under CAA section 110(c)(1) to promulgate a federal implementation plan to address the deficiency unless the State submits and the EPA approves a plan revision correcting the deficiency within two years (76 FR 69896, 69924, November 9, 2011).

CARB submitted this corrective SIP on July 3, 2013.[8] We proposed to approve the Contingency Measure SIP on August 28, 2013 (78 FR 53113). Concurrently, we issued an interim final determination to stay offset sanctions and defer highway sanctions in the SJV area, based on our "proposal to approve the State's SIP revision as correcting the deficiency that initiated these sanctions" (78 FR 53038, August 28, 2013).[9] To disapprove this corrective SIP submission now, based on a retroactive application of subpart 4 requirements to the SJV $PM_{2.5}$ SIP, would immediately subject the SJV area to offset sanctions and highway sanctions under the EPA's sanction application sequencing rule in 40 CFR 52.31(d)(2)(ii).[10] We believe it would be unreasonable to now disapprove this SIP submission, which corrects the deficiencies we had identified, and subject the SJV area to mandatory sanctions solely because the State did not address subpart 4 requirements of which it had no notice.[11]

Moreover, it is not clear what RFP projections would result from the new subpart 4 plan that Earthjustice calls for and, consequently, it is impossible for the State to quantify a contingency

[8] Letter dated July 3, 2013, from Richard W. Corey, Executive Officer, California Air Resources Board, to Jared Blumenfeld, Regional Administrator, U.S. EPA Region 9, transmitting the San Joaquin Valley Air Pollution Control District's "Quantification of Contingency Reductions for the 2008 $PM_{2.5}$ Plan" (adopted June 20, 2013), with enclosures.

[9] Under 40 CFR 52.31(d)(2)(ii), during the period between 18 and 24 months following the EPA's disapproval of a plan submission, offset sanctions are stayed and highway sanctions deferred if the EPA proposes to approve a revised plan submitted by the State and issues an interim final determination that the revised plan "corrects the deficiency prompting the [disapproval]."

[10] The offset sanction initially applied in the SJV area on July 9, 2013 (78 FR 53038, August 28, 2013). Thus, under 40 CFR 52.31(d)(2)(ii), the offset sanction would reapply on the date the EPA issued a proposed or final disapproval and the highway sanction would apply immediately because more than 6 months have passed since initial application of the offset sanction.

[11] As the U.S. District Court for the District of Colorado recently stated, "retroactive application of Subpart 4 to impose deadlines of which the States were not previously aware would be unfair and contrary to the state/federal balance outlined in the CAA." *See Wildearth Guardians v. Gina McCarthy,* Case No. 13-CV-1275-WJM-KMT (D. Colo., March 11, 2014) at 12.

measure obligation based on such a new plan before it is developed.[12] It would be even more unreasonable to disapprove this corrective SIP submission on the basis of RFP trajectories that cannot currently be ascertained, particularly given the lengthy rulemakings that would be necessary for the State to develop a new plan under subpart 4 with new RFP targets and a new attainment deadline, and the likely economic hardship that would result from continued application of mandatory offset and highway sanctions during this time. The D.C. Circuit recognized the inequity of this type of retroactive impact in *Sierra Club v. Whitman,* 285 F.3d 63 (D.C. Cir. 2002), where it upheld the district court's ruling refusing to make retroactive the EPA's determination that the St. Louis area did not meet its attainment deadline. In that case, petitioners urged the court to make the EPA's nonattainment determination effective as of the date that the statute required, rather than the later date on which the EPA actually made the determination. The court rejected this view, stating that applying it "would likely impose large costs on the States, which would face fines and suits for not implementing air pollution prevention plans * * * even though they were not on notice at the time." *Id.* at 68. Similarly, it would be unreasonable to penalize California by rejecting this corrective SIP on the basis of subpart 4 requirements of which the State was unaware when we partially disapproved the SJV $PM_{2.5}$ SIP, particularly when relief from mandatory sanctions would not be available until after the State completes a lengthy rulemaking process to adopt an entirely new plan under subpart 4.

[12] As the EPA explained in the preamble to the 2007 $PM_{2.5}$ Implementation Rule, contingency measures should provide for emission reductions equivalent to about one year of reductions needed for RFP, based on the overall level of reductions needed to demonstrate attainment divided by the number of years from the "base year" to the attainment year (72 FR 20586, 20643, April 25, 2007). Thus, without first establishing the relevant base year, the attainment year, and the overall level of reductions needed to demonstrate attainment, and then considering whether available controls (whether RACM or BACM) might expedite the attainment date, it is impossible to determine the rate of emission reductions that would demonstrate RFP and the corresponding amount of emission reductions that would be equivalent to about one year of RFP.

In separate rulemakings, the EPA has taken steps to respond to the *NRDC* decision by addressing the applicable requirements of subpart 4 for areas designated nonattainment for the 1997 $PM_{2.5}$ NAAQS and/or the 2006 $PM_{2.5}$ NAAQS. For example, the EPA recently completed a rulemaking to classify all $PM_{2.5}$ nonattainment areas nationwide, including the San Joaquin Valley, as "moderate" nonattainment under subpart 4 and to establish a December 31, 2014 deadline for the states to submit any additional SIP revisions that may be necessary to satisfy the requirements applicable to moderate nonattainment areas under CAA section 189(a). *See* 78 FR 69806 (November 21, 2013) (proposed rule) and "Identification of Nonattainment Classification and Deadlines for Submission of State Implementation Plan (SIP) Provisions for the 1997 Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standard (NAAQS) and 2006 $PM_{2.5}$ NAAQS," signed April 25, 2014 (final rule, pre-publication copy). As explained in that rulemaking, the EPA recognizes that prior to the D.C. Circuit's decision in *NRDC,* states have worked towards meeting the air quality goals of both the 1997 $PM_{2.5}$ standards and the 2006 $PM_{2.5}$ standards in accordance with EPA regulations and guidance derived from subpart 1, including the requirements of the 2007 $PM_{2.5}$ Implementation Rule (78 FR 69806, 69809). Taking this history into account, the EPA concluded that a December 31, 2014 deadline would provide states a relatively brief but reasonable amount of time to ascertain whether and to what extent any additional SIP submissions would be needed to satisfy the applicable requirements of subpart 4 in a particular nonattainment area and to develop, adopt and submit any such SIPs. *See id.* The EPA explicitly stated that this rulemaking "does not affect any action that the EPA has previously taken under section 110(k) of the Act on a SIP for a $PM_{2.5}$ nonattainment area." *Id.* at 69810.

Accordingly, California is obligated to consider whether and to what extent any additional SIP submissions may be required to satisfy the applicable requirements of subpart 4 for the 1997 and/or 2006 $PM_{2.5}$ NAAQS in the SJV and to develop, adopt and submit any such SIPs, following reasonable notice and public hearings, no later than December 31, 2014. In the meantime, our November 2011 final action remains in effect and continues to provide the appropriate basis for calculating the required quantity of emission reductions in this corrective SIP. We believe it is appropriate to address the *NRDC* decision on a prospective rather than retrospective basis by maintaining the environmental benefits of air quality plans that the EPA has previously approved while working with state and local agencies to supplement these prior submissions as necessary going forward. Our approval of the Contingency Measure SIP today does not obviate the State's obligation to submit these additional SIP revisions, consistent with the requirements of subpart 4, including additional contingency measures as necessary.

Comment 2: Earthjustice argues that the EPA cannot claim that the Contingency Measure SIP and the SJV $PM_{2.5}$ SIP are consistent with the implementation rule remanded by the D.C. Circuit pending adoption of a new implementation rule. According to Earthjustice, subpart 4 is self-effectuating and directly-enforceable and does not require EPA regulations in order for states to know their planning obligations. Additionally, Earthjustice states that the EPA has already adopted guidance interpreting subpart 4 in "State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990" (57 FR 13498, April 16, 1992) (hereafter "General Preamble") and in "State Implementation Plans for Serious PM-10 Nonattainment Areas, and Attainment Date Waivers for PM-10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990" (59 FR 41998, August 16, 1994) (hereafter "Addendum"). According to

Earthjustice, the requirements of subpart 4 are plain on their face and well understood, and the *NRDC* holding means that these requirements have always applied to $PM_{2.5}$ nonattainment plans notwithstanding the EPA's efforts to avoid them.

Response 2: It appears Earthjustice is arguing that *NRDC* compels us to disapprove the Contingency Measure SIP based on a retroactive application of subpart 4 requirements to the underlying SJV $PM_{2.5}$ SIP. We disagree with this assertion. As explained above, we do not believe it would be reasonable to disapprove this corrective SIP based on a finding that the underlying attainment and RFP demonstrations in the SJV $PM_{2.5}$ SIP, which we fully approved in 2011, now fail to satisfy subpart 4 requirements of which the State had no notice. As discussed in our proposal (78 FR 53113, 53123), the Contingency Measure SIP corrects the deficiencies that prompted the partial disapproval of the SJV $PM_{2.5}$ SIP in 2011. We believe our approval of this corrective SIP submission today is appropriate in light of the State's reasonable reliance on the 2011 final action, the significant consequences of a disapproval based on retroactive application of subpart 4 requirements in this context, and the EPA's separate rulemaking to establish reasonable timeframes for states to submit additional SIPs that may be required to satisfy the requirements of under subpart 4. *See* Response 1.

The commenter does not appear to challenge our position that the general contingency measure requirement in subpart 1 (CAA section 172(c)(9)) continues to govern our evaluation of and action on the Contingency Measure SIP.[13] Under the EPA's long-standing policy, which pre-

[13] As explained in our proposed rule, subpart 4 of part D, title I of the Act contains no specific provision governing contingency measures for PM_{10} or $PM_{2.5}$ nonattainment areas that supersedes the general contingency measure requirement for all nonattainment areas in CAA section 172(c)(9). Thus, even if we apply the subpart 4 requirements to our evaluation of the Contingency Measure SIP and disregard the provisions of the 2007 $PM_{2.5}$ Implementation Rule remanded by the *NRDC* court, the general requirement for contingency measures in CAA section 172(c)(9) continues to apply (78 FR 53113, 53115 n. 8).

dates the 2007 $PM_{2.5}$ Implementation Rule by more than a decade, contingency measures in a SIP should consist of available control measures beyond those required in the control strategy to attain the standards or demonstrate RFP, provide SIP-creditable emission reductions equal to approximately one year of the emission reductions needed for RFP, and be implemented without further action by the State. *See* General Preamble at 13543 to 13544 (discussing contingency measures for moderate PM_{10} nonattainment areas); *see also* Addendum at 42014 to 42015 (discussing contingency measures for serious PM_{10} nonattainment areas). We are approving the Contingency Measure SIP because it meets these criteria as applied to the SJV $PM_{2.5}$ SIP and because it corrects the deficiencies that prompted the 2011 partial disapproval of that plan (78 FR 53113, 53123).

Our approval of the Contingency Measure SIP today does not rest on a conclusion that compliance with the 2007 $PM_{2.5}$ Implementation Rule remanded by the court suffices to satisfy CAA requirements pending adoption of a new implementation rule, nor does the EPA believe an implementation rule is necessary for states to know their planning obligations under subpart 4. Indeed, although the EPA has not yet issued a new or revised implementation rule consistent with the court's directive in *NRDC,* the EPA has established a December 31, 2014 deadline for all states with $PM_{2.5}$ nonattainment areas to submit any additional SIPs that may be required under subpart 4, following consultation as appropriate with EPA regional offices. *See* "Identification of Nonattainment Classification and Deadlines for Submission of State Implementation Plan (SIP) Provisions for the 1997 Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standard (NAAQS) and 2006 $PM_{2.5}$ NAAQS," signed April 25, 2014 (final rule, pre-publication copy). To the extent any revisions to the SJV $PM_{2.5}$ SIP are necessary to ensure

compliance with the requirements of subpart 4, California is required to adopt and submit such SIP revisions by December 31, 2014, including additional contingency measures as appropriate.

Comment 3: Earthjustice comments that the EPA cannot claim as a basis for approval that the Contingency Measure SIP satisfies the obligations identified in the EPA's 2011 final action on the SJV $PM_{2.5}$ SIP because that plan does not comply with the Act. Earthjustice contends that the approval of the Contingency Measure SIP would "compound the legal defects of the [SJV $PM_{2.5}$ SIP]" and that we should act immediately to "call" the SJV $PM_{2.5}$ SIP under CAA section 110(k)(5) because we now know that the plan fails to comply with the requirements of the Act. In the meantime, Earthjustice asserts that we cannot add to the legal defects by approving contingency measures that are based on a defective plan. In support of these arguments, Earthjustice cites *Association of Irritated Residents* v. *EPA,* 632 F.3d 584 (9th Cir. 2011), reprinted as amended on January 27, 2012, 686 F.3d 668, further amended February 13, 2012 ("*AIR"*).

Response 3: We disagree with these arguments. First, as discussed above, nothing in *NRDC* compels us to retroactively apply subpart 4 requirements to the SJV $PM_{2.5}$ SIP and to disapprove the Contingency Measure SIP on that basis. Absent an EPA rulemaking to withdraw or revise our November 2011 final action on the SJV $PM_{2.5}$ SIP (76 FR 69896, November 9, 2011), that final action remains effective and provides an appropriate basis for our evaluation of the State's corrective SIP submission in accordance with the EPA's long-standing policies on contingency measures. *See* Response 1.

Second, the EPA's discretionary "SIP call" authority in CAA section 110(k)(5) is not relevant to this action as we have not made any of the findings that would obligate us to "call" the SJV $PM_{2.5}$ SIP. Section 110(k)(5) provides, in relevant part, that "[w]henever the

Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant [NAAQS] . . . or to otherwise comply with any requirement of [the CAA]," the EPA "shall require the State to revise the plan as necessary to correct such inadequacies" and may establish reasonable deadlines, not to exceed 18 months after providing notice to the State, for the submission of such plan revisions. CAA section 110(k)(5), 42 U.S.C. 7410(k)(5). Should we find that the SJV $PM_{2.5}$ SIP is "substantially inadequate to attain or maintain" the 1997 $PM_{2.5}$ NAAQS or to otherwise comply with any requirement of the Act, we would be obligated to require that California revise the plan as necessary to correct such inadequacies (i.e., to issue a "SIP call") and would be authorized to establish reasonable deadlines for the State to submit such plan revisions, not to exceed 18 months after the EPA notifies the State of the inadequacies. To date, however, we have not made any such finding under section 110(k)(5) with respect to the SJV $PM_{2.5}$ SIP. The EPA believes that its recent rulemaking to classify all $PM_{2.5}$ nonattainment areas as "moderate" nonattainment and to set a December 31, 2014 deadline for subpart 4 SIP submissions provides a reasonable timeframe for California to develop, adopt and submit any additional SIP submissions that are necessary to comply with the requirements of subpart 4 in the San Joaquin Valley. *See* "Identification of Nonattainment Classification and Deadlines for Submission of State Implementation Plan (SIP) Provisions for the 1997 Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standard (NAAQS) and 2006 $PM_{2.5}$ NAAQS," signed April 25, 2014 (final rule, pre-publication copy). Under CAA section 110(k)(5), the EPA retains the discretion to determine after this deadline for SIP submissions whether the $PM_{2.5}$ SIP for the SJV is substantially inadequate to comply with CAA requirements.

Finally, the Ninth Circuit Court of Appeal's decision in *AIR* is inapposite. *AIR* involved our action on proposed revisions to the SIP for the one-hour ozone standard for the Los Angeles-South Coast air basin (686 F.3d 668 at 671). An approved SIP for the area was in place, but after conducting new modeling for the one-hour ozone standard, California submitted proposed SIP revisions, including a revised attainment demonstration that relied on additional control measures. *Id.* at 672-73. California later withdrew certain of the proposed additional control measures and the State specifically represented that the currently approved plan was not sufficient to provide for attainment. *Id.* We approved the control measures that had not been withdrawn. *Id.* at 673. However, we disapproved the revised attainment demonstration because California had substantially based it upon emission reductions resulting from the withdrawn control measures. *Id.* This disapproval left in place the existing attainment demonstration, which the State had specifically characterized as deficient. *Id.* The Ninth Circuit held that our action was arbitrary and capricious, because we had a duty under CAA section 110(l) to evaluate whether the SIP, as a whole, would provide for attainment of the NAAQS when the EPA approved a revision to the already approved SIP. *Id.* at 673-74.

The circumstances here are significantly different from those in *AIR*. First, nothing in the record indicates that California considers any element of the currently approved SJV $PM_{2.5}$ SIP insufficient to provide for attainment of the 1997 $PM_{2.5}$ standards. Second, the Contingency Measure SIP neither revises nor replaces the attainment demonstration in the currently approved plan, nor does it alter any existing emission limitation or other control requirement in the applicable SIP. Finally, California has not withdrawn any control measures that provide emission reductions necessary for attainment of the 1997 $PM_{2.5}$ standards; to the contrary, the Contingency Measure SIP expands upon the contingency measure portion of the SJV $PM_{2.5}$ SIP by providing

additional NO_x, SO_x, and direct $PM_{2.5}$ emission reductions beyond those relied upon for RFP and attainment in the SJV $PM_{2.5}$ SIP, thereby correcting the deficiency that we had identified in 2011 (78 FR 5311, 53123). In sum, nothing in the Contingency Measure SIP revises the currently approved attainment demonstration in the SJV $PM_{2.5}$ SIP, nor does any information in the State's submissions raise a question about the plan's sufficiency to provide for timely attainment of the 1997 $PM_{2.5}$ standards. The *AIR* decision therefore is not pertinent to our action.

For these reasons, we disagree with the commenter's claim that our approval of the Contingency Measure SIP would "compound" or "add to" existing legal defects in the SJV $PM_{2.5}$ SIP. Because our approval of the Contingency Measure SIP strengthens the SIP and does not interfere with the on-going process for ensuring that requirements for RFP and attainment of the 1997 $PM_{2.5}$ NAAQS are met, we find that it complies with CAA section 110(l). To the extent California is obligated to submit additional SIP revisions consistent with subpart 4 requirements by December 31, 2014, these outstanding obligations do not preclude approval today of the Contingency Measure SIP as adequate to correct prior SIP deficiencies that triggered sanctions clocks. *See* Response 1.

Comment 4: Earthjustice comments that the SJV $PM_{2.5}$ SIP fails to properly address $PM_{2.5}$ precursor emissions and that the EPA approved the plan based on the "illegal presumption" in the 2007 $PM_{2.5}$ Implementation Rule that VOC and ammonia need not be controlled. Earthjustice argues that because the *NRDC* court has rejected this presumption, without a showing that sources of these precursor emissions do not contribute significantly to $PM_{2.5}$ levels, they are subject to controls and therefore subject to separate contingency measure targets. Earthjustice further argues that the San Joaquin Valley APCD has made no such demonstration and that "the record currently before EPA suggests that these emissions do contribute significantly to ambient

levels even though the District believes that a strategy focusing on oxides of nitrogen is better policy." In support of these arguments, Earthjustice references our responses to comments regarding VOCs in our final action on the SJV $PM_{2.5}$ SIP (76 FR 69896, 69902).

Response 4: To the extent the commenter is challenging the November 2011 final action on the SJV $PM_{2.5}$ SIP based on the D.C. Circuit's January 2013 decision in *NRDC*, such a challenge may only be brought in the U.S. Court of Appeals for the appropriate circuit within specified timeframes under CAA section 307(b). We are today acting on a SIP revision submitted by the State to correct SIP deficiencies that prompted sanctions, and comments concerning the analyses underlying the November 2011 action on the SJV $PM_{2.5}$ SIP are not germane to this action. *See* Response 1.

As discussed above, the November 2011 final action on the SJV $PM_{2.5}$ SIP remains in effect and we believe that it would be unreasonable to retroactively apply the requirements of subpart 4 to our prior evaluation of the $PM_{2.5}$ precursor assessment in the SJV $PM_{2.5}$ SIP. Although the EPA has taken steps in a separate rulemaking to respond to the *NRDC* decision regarding subpart 4 and is requiring all states with $PM_{2.5}$ nonattainment areas, including California, to submit SIP revisions as necessary to address subpart 4 requirements no later than December 31, 2014, that rulemaking specifically notes that it does not affect any action that the EPA has previously taken under CAA section 110(k) on a SIP for a $PM_{2.5}$ nonattainment area. *See* 78 FR 69806, 69810 (November 21, 2013) and "Identification of Nonattainment Classification and Deadlines for Submission of State Implementation Plan (SIP) Provisions for the 1997 Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standard (NAAQS) and 2006 $PM_{2.5}$ NAAQS," signed April 25, 2014 (final rule, pre-publication copy). Accordingly, the RFP demonstration in the SJV $PM_{2.5}$

SIP remains the appropriate basis for our evaluation of the specific types and amounts of emission reductions provided by the Contingency Measure SIP at this time. *See* Response 1.

Even if the EPA takes the view that *NRDC* compels us to retroactively apply the requirements of subpart 4 to our prior evaluation of the $PM_{2.5}$ precursor assessment in the SJV $PM_{2.5}$ SIP, it is not clear at this time how such a reevaluation would affect the assessment of required contingency measures. The D.C. Circuit remanded the EPA's 2007 $PM_{2.5}$ Implementation Rule, including the presumptions concerning VOC and ammonia in 40 CFR 51.1002.[14] While expressly declining to decide the specific challenge to these presumptions (*see* 706 F.3d at 437, n. 10 (D.C. Cir. 2013)), the court cited CAA section 189(e)[15] to support its observation that "[a]mmonia is a precursor to fine particulate matter, making it a precursor to both $PM_{2.5}$ and PM_{10}" and that "[f]or a PM_{10} nonattainment area governed by subpart 4, a precursor is presumptively regulated." 706 F.3d at 436, n. 7 (*citing* CAA section 189(e), 42 U.S.C. 7513a(e)). The *NRDC* court did not, however, address whether and how it was substantively necessary to regulate any specific precursor in a particular $PM_{2.5}$ nonattainment area. Moreover, even assuming both VOC and ammonia must be regulated for purposes of attaining the 1997 $PM_{2.5}$ standards in the SJV, it is not clear what collection of control measures for which specific precursors would ultimately be necessary to satisfy the requirements in

[14] The 2007 $PM_{2.5}$ Implementation Rule contained rebuttable presumptions concerning certain $PM_{2.5}$ precursors applicable to attainment plans and control measures related to those plans. Specifically, in 40 CFR 51.1002(c), the EPA provided, among other things, that a state was "not required to address VOC [and ammonia] as * * * $PM_{2.5}$ attainment plan precursor[s] and to evaluate sources of VOC [and ammonia] emissions in the State for control measures," unless the State or the EPA provided an appropriate technical demonstration showing that emissions from sources of these pollutants "significantly contribute" to $PM_{2.5}$ concentrations in the nonattainment area (40 CFR 51.1002(c)(3), (4)).

[15] CAA section 189(e) provides that control requirements for major stationary sources of direct PM_{10} shall also apply to PM_{10} precursors from those sources, except where the EPA determines that major stationary sources of such precursors "do not contribute significantly to PM_{10} levels which exceed the standard in the area."

subpart 4 concerning reasonably available control measures (CAA section 189(a)(1)(C)), best available control measures (CAA section 189(b)(1)(B)), or quantitative milestones demonstrating RFP (CAA section 189(c)). *See,* e.g.*,* General Preamble at 13540 to 13541 (discussing technological feasibility, cost of control, and "de minimis" emission levels among factors to be considered in determining RACM and RACT for a particular PM_{10} nonattainment area); *see also* Addendum at 42011 to 42014 (distinguishing BACM from RACM standard and discussing factors to be considered in determining BACM and BACT for a particular PM_{10} nonattainment area, including technological and economic feasibility). Given that it is thus currently impossible to identify the precise collection of control measures that would be necessary in a new subpart 4 plan, let alone to quantify the emission reductions that these measures would collectively achieve and then calculate the reductions that would be required for associated contingency measure purposes,[16] we do not believe it would be reasonable to penalize the State at this time for failure to carry out these tasks in the past. The State and District must first address these issues as appropriate through adoption of a SIP revision satisfying the requirements of subpart 4, which is due December 31, 2014.

Under the commenter's read of *NRDC*, relief from mandatory sanctions for SIP deficiencies identified prior to the *NRDC* decision would be unavailable to California until it completes lengthy State and local rulemaking processes to develop and adopt an entirely new attainment plan that satisfies the requirements of subpart 4, requirements that are not yet due and that we have not, to date, identified as bases for plan disapproval. We decline to read the court's decision in a way that would lead to such an inequitable and retroactive result.

[16] *See* n. 12, supra.

Comment 5: Earthjustice claims that the alleged legal defects of the SJV $PM_{2.5}$ SIP preclude the EPA from determining that the proposed contingency measures are "beyond or in addition to" the core control requirements of the CAA. Earthjustice argues that this problem is most apparent in the EPA's treatment of the contingency provision in the District's residential woodburning rule, Rule 4901. Citing our November 2011 responses to comments on the SJV $PM_{2.5}$ SIP (76 FR 69896, 69904), Earthjustice states that we did not require implementation of this measure as a basic control measure on the basis that it would not "advance attainment" by at least a year and argues that this justification "is no longer sufficient if the area is subject to the [BACM] requirement, as it must be given that it has failed to attain within four years of its designation as nonattainment for $PM_{2.5}$." Earthjustice asserts that BACM are more stringent than reasonably available controls and cannot be rejected based on whether or not they advance attainment, and that credit for the Rule 4901 contingency measure is therefore inappropriate. Furthermore, Earthjustice asserts that our 2009 approval of Rule 4901 as BACM for PM_{10} is "not sufficient for concluding that improvements such as those included in the proposed contingency measure are beyond [BACM]" as the necessary demonstration has not been made and "there is no reason to believe that the lower trigger included in the proposed contingency measure is not technically feasible or cost-effective." Noting that the problems associated with $PM_{2.5}$ in the Valley are different than those associated with PM_{10}, Earthjustice cites the preamble to the EPA's 2007 $PM_{2.5}$ Implementation Rule (72 FR 20617) to support its conclusion that "past determinations on the adequacy of control measures cannot substitute for a new demonstration for a new state implementation plan."

***Response 5*:** As noted above, it appears the commenter is challenging the November 2011 final action on the SJV $PM_{2.5}$ SIP based on the D.C. Circuit's January 2013 decision in *NRDC*. Such a

challenge, however, may only be brought in the U.S. Court of Appeals for the appropriate circuit within specified timeframes under CAA section 307(b). We are today acting on a SIP revision submitted by the State to correct SIP deficiencies that prompted sanctions, and comments concerning the analyses underlying the EPA's November 2011 action on the SJV $PM_{2.5}$ SIP are not germane to this action. *See* Response 1.

We nonetheless respond below to the substance of the commenter's claims. To the extent the commenter is arguing that our action today on the Contingency Measure SIP constitutes a determination that the contingency provision in Rule 4901 is "beyond BACM," this is incorrect. We have not yet made any determination concerning BACM for $PM_{2.5}$ in the SJV and make no such determination today, as the area has not been classified as a "Serious Area" area under subpart 4 and the State therefore has not submitted a Serious Area plan for SJV for any $PM_{2.5}$ standard. *See* CAA section 189(b)(1)(B) (requiring that "each State in which all or part of a Serious Area is located" submit a plan for such area that includes BACM for the control of PM_{10}) and section 189(b)(2) (requiring submission of BACM provisions "no later than 18 months after reclassification of the area as a Serious Area"). Although Earthjustice suggests that we are relying on the Agency's prior (2009) approval of Rule 4901 as BACM for the control of PM_{10} as a basis for today's action, this suggestion is also incorrect. As part of the 2011 action on the SJV $PM_{2.5}$ SIP, we concluded that the contingency provision in Rule 4901 was not a required RACM under CAA section 172(c)(1)[17] and that it qualified for consideration as a contingency measure because it provided emission reductions beyond those relied upon for RFP or attainment in that plan. *See* 76 FR 41338, 41358 (July 13, 2011) and 76 FR 69896, 69904 and 69906

[17] In response to comments on the SJV $PM_{2.5}$ SIP, we discussed the 2009 approval of Rule 4901 for PM_{10} BACM purposes as relevant context, but the Agency's approval of the RACM demonstration in the SJV $PM_{2.5}$ SIP did not rely on this prior action (76 FR 69896, 69904 and 69906, November 9, 2011).

(November 9, 2011). We disagree with the commenter's claim that we must now also conclude that the contingency provision in Rule 4901 is not a required BACM under CAA section 189(b)(1)(B).

Likewise, we disagree with the commenter's contention that our November 2011 rationale for not requiring implementation of this measure as a basic control measure (i.e., on the basis that it would not "advance attainment" by at least a year) is no longer sufficient because the area has failed to attain within four years of its designation as nonattainment for $PM_{2.5}$ and is, therefore, now subject to the BACM requirement. Under the CAA, BACM is required only for nonattainment areas classified as serious (CAA section 189(b)(1)(B)). The SJV area is currently classified as moderate nonattainment. *See* "Identification of Nonattainment Classification and Deadlines for Submission of State Implementation Plan (SIP) Provisions for the 1997 Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standard (NAAQS) and 2006 $PM_{2.5}$ NAAQS," signed April 25, 2014 (final rule, pre-publication copy). Whether or not the SJV area has attained the 1997 $PM_{2.5}$ standards to date, in the absence of an EPA rulemaking to reclassify the area as a Serious Area under subpart 4, the requirement to submit a Serious Area plan that assures implementation of BACM does not apply (CAA sections 189(b)(1)(B) and 189(b)(2)).

We note also that the commenter's reference to CAA section 188(c)(1) to support its contention that "[u]nder subpart 4, nonattainment areas relying on reasonably available controls have four years to attain" is not accurate. Section 188(c)(1) states that "[f]or a Moderate Area, the attainment date shall be as expeditiously as practicable but no later than the end of the sixth calendar year after the area's designation as nonattainment, except that, for areas designated nonattainment for PM_{10} under section [107(d)(4) of the Act], the attainment date shall not extend beyond December 31, 1994" (CAA section 188(c)(1), 42 U.S.C. 7513(c)(1)). It appears that the

commenter is interpreting the exception specified in the last clause of this provision to mean that the SJV $PM_{2.5}$ nonattainment area must attain the 1997 $PM_{2.5}$ NAAQS within four years of its designation as nonattainment for these standards. By its terms, however, this provision establishes an attainment date that has long passed (December 31, 1994) and applies only to those areas that were designated by operation of law under CAA section 107(d)(4) as nonattainment for the PM_{10} NAAQS, pursuant to the CAA Amendments of 1990. *See* CAA section 107(d)(4)(B), 42 U.S.C. 7407(d)(4)(B) (establishing nonattainment designations by operation of law for certain areas identified by the EPA as "Group I" areas prior to November 15, 1990 and areas where air quality monitoring data showed a violation of the PM-10 NAAQS before January 1, 1989). This provision and the December 31, 1994 attainment date specified therein do not apply for purposes of establishing the applicable attainment date for an area designated nonattainment for the 1997 $PM_{2.5}$ NAAQS in 2005, such as the San Joaquin Valley.

If and when the EPA reclassifies the SJV area from "moderate" to "serious" nonattainment for a $PM_{2.5}$ standard under subpart 4,[18] California will be obligated to submit, no later than 18 months after such reclassification, SIP provisions to assure that BACM for $PM_{2.5}$ shall be implemented no later than 4 years after the date the area is reclassified, among other things (CAA sections 189(b)(1)(B) and 189(b)(2)). Contingency measures for any new or revised plan submitted to address subpart 4 requirements would have to provide emission reductions beyond

[18] Under CAA sections 188(b)(2) and 179(c), the EPA must determine no later than 6 months following the applicable attainment date for the 1997 $PM_{2.5}$ standards in the SJV (April 5, 2015), based on air quality data, whether the area attained the standards by that date. Should we determine that the SJV area has failed to attain by April 5, 2015, the area will be reclassified by operation of law as a Serious Area and the State will be required to submit plan provisions consistent with the requirements of subpart 4 within 18 months. *See* CAA sections 188(b)(2) and 189(b)(2).

those relied upon in the control strategy for that plan (i.e., for a "Serious Area," measures that are "beyond BACM").

We note that the possibility that a measure may be required as RACM or BACM in the future does not preclude its use as a contingency measure now. Likewise, an approval of a measure as a contingency measure now does not preclude a future determination that it is a required RACM or BACM under subpart 4. As the EPA explained in the Addendum, "if all or part of the moderate area plan contingency measures become part of the required serious area control measures (i.e., BACM), then additional contingency measures must be submitted whether or not the previously submitted contingency measures had already been implemented." Addendum at 42015.

Comment 6: Earthjustice comments that because the RFP demonstration will change under a plan that complies with subpart 4, the assessment of the controls required for demonstrating RFP will also change. Earthjustice argues that without a new RFP demonstration, the EPA cannot determine whether the contingency measures are surplus to measures that are otherwise required by the Act.

***Response 6*:** As explained above, we do not believe it would be reasonable to disapprove this corrective SIP based on a finding that the underlying attainment and RFP demonstrations in the SJV $PM_{2.5}$ SIP, demonstrations that we fully approved in 2011, now fail to satisfy subpart 4 requirements of which the State had no notice. As discussed in our proposal (78 FR 53113, 53123), the Contingency Measure SIP corrects the deficiencies that prompted the partial disapproval of the SJV $PM_{2.5}$ SIP in 2011. We believe our approval of this corrective SIP submission today is appropriate in light of the State's reasonable reliance on our 2011 final action, the significant consequences of a disapproval based on retroactive application of subpart 4 requirements in this context, and the EPA's separate rulemaking to establish reasonable

timeframes for states to submit additional SIPs that may be required under subpart 4 consistent with the *NRDC* decision. *See* Response 1.

B. Comments regarding emission reductions from waiver measures and incentive grant programs

Comment 7: Earthjustice comments that "Congress was not willing to let states merely 'promise' to protect air quality" and that CAA section 110(a) requires states to formulate plans for meeting and maintaining compliance with the NAAQS which "include enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights) . . . as may be necessary or appropriate to meet the applicable requirements of this chapter . . . ." Earthjustice states that even those nontraditional techniques for reducing pollution (economic incentives, marketable permits, and auctions of emissions rights) authorized by section 110(a)(2)(A) must be "enforceable," meaning that the EPA and citizens must have the ability to bring enforcement actions to assure compliance. Earthjustice further asserts that "[a] state cannot claim SIP credit from control measures that shield pollution sources from independent enforcement actions." In support of these statements, Earthjustice references the EPA's statements in "State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990" (57 FR 13498, April 16, 1992) (hereafter "General Preamble"); "Improving Air Quality with Economic Incentive Programs," U.S. EPA, Office of Air and Radiation, January 2001 (EPA-452/R-01-001) (hereafter "2001 EIP Guidance"); and the February 4, 2013 docket memorandum for a rulemaking entitled "State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess

Emissions During Periods of Startup, Shutdown, and Malfunction" (EPA-HQ-OAR-2012-0322) (hereafter "2013 SSM Memo").

Response 7: We agree generally with the statement that the CAA requires states to submit implementation plans including measures that the EPA and citizens can enforce. As the commenter notes, the EPA has long interpreted CAA section 110(a) to mean that control measures and other means of achieving emission reductions in a SIP, including "nontraditional techniques for reducing pollution [such as] economic incentives, marketable permits, and auctions of emissions rights," must be "enforceable" (General Preamble at 13556). We disagree, however, with Earthjustice's suggestion that the emission reductions identified in the Contingency Measure SIP are not enforceable because they are based on "measures that shield pollution sources from independent enforcement actions." As explained below in Response 8 through Response 15, all of the measures relied upon in the Contingency Measure SIP are directly enforceable by the State and/or District against pollution sources, and the District's commitments concerning the incentive-based emission reductions are also enforceable by the EPA and citizens under the CAA. Nothing in the Contingency Measure SIP "shields" pollution sources from enforcement actions brought by the State or District. *See* Response 8 through Response 15.

Comment 8: Earthjustice highlights both the EPA's enforcement authority in CAA section 113 and the citizen suit provision in CAA section 304 as indication that "Congress was not willing to rely on states alone to guarantee that the claimed emission reductions would occur or be enforced." Citing *Pennsylvania* v. *Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986), Earthjustice states that "[t]he Supreme Court has found that 'Congress enacted 304 specifically to encourage citizen participation in the enforcement of standards and regulations

established under this Act, and intended the section to afford citizens very broad opportunities to participate in the effort to prevent and abate air pollution.'" Additionally, Earthjustice states that "[t]his notion that SIPs must be built upon emission reductions that are capable of being enforced by EPA and citizens pervades a number of EPA policies regarding SIP approvability." For example, Earthjustice states that the "EPA will not approve control measures that include 'director discretion' to define or redefine compliance requirements" and that the EPA also will "not allow SIPs to include state affirmative defenses that would foreclose EPA or other enforcement." In support of these statements, Earthjustice references EPA statements in the 2013 SSM Memo and in a memorandum dated September 20, 1999, from Steven A. Herman, Assistant Administrator for Enforcement and Compliance, to Regional Administrators, entitled "State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (hereafter "1999 SSM Guidance"). Earthjustice asserts that the two main contingency measures relied upon by the District – excess emission reductions from State mobile source measures and emission reductions achieved through incentive programs – fail to meet these criteria for enforceability.

Response 8: We agree generally with the commenter's statement that SIPs must be built upon emission reductions that the EPA and citizens can enforce under CAA sections 113 and 304, respectively. We disagree, however, with the commenter's assertion that the contingency measures relied upon by the District contain any impermissible "director discretion" or "affirmative defense" provisions that may bar EPA or citizen enforcement of these measures or otherwise fail to meet the Act's requirements for enforceability.

As Earthjustice correctly states, the EPA has stated in long-standing policy that it would not approve into a SIP any "director discretion" or "affirmative defense" provision that would bar

the EPA or citizens from enforcing applicable SIP requirements, as such provisions would be inconsistent with the regulatory scheme established in title I of the Act. *See* 2013 SSM Memo at 11-13 (quoting 1999 SSM Guidance at 3). Although some degree of state/local agency discretion in a SIP rule may be permissible if explicit and replicable procedures within the rule tightly define how the discretion will be exercised to assure equivalent emission reductions, the EPA has long stated that SIP provisions that include unbounded discretion for state personnel unilaterally to change or to grant variances from applicable SIP provisions are problematic and inconsistent with the requirements of the CAA. *See* "Guidance Document for Correcting Common VOC and Other Rule Deficiencies (a.k.a. The Little Bluebook)," U.S. EPA Region IX, originally issued April 1991, revised August 21, 2001; *see also* 78 FR 12460, 12485 to 12486 (February 22, 2013) (proposed findings of substantial inadequacy and SIP calls to amend provisions applying to excess emissions during periods of startup, shutdown, and malfunction) and 2013 SSM Memo at 13. With respect to "affirmative defenses,"[19] the EPA has stated in long-standing policy that a state may include in a SIP certain narrowly drawn affirmative defense provisions, which qualifying sources may utilize in enforcement proceedings under specified circumstances, but that a SIP may not contain any defense to injunctive relief or any provision that would enable a state to bar EPA or citizen enforcement of applicable requirements. *See* 2013 SSM Memo at 11-13; *see also* 1999 SSM Guidance at 2.

Nothing in the Contingency Measure SIP authorizes either CARB or the District to modify the requirements of the SIP. As explained below in Response 13, the District has submitted enforceable commitments to account for specified amounts of NO_x and $PM_{2.5}$ emission

[19] The term "affirmative defense" means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding. *See* 1999 SSM Memo, Attachment at 2, n. 4.

reductions to be achieved in 2015 through incentive programs and to adopt and submit substitute measures on a fixed schedule if the identified programs fail to achieve these emission reductions in 2015. Since the EPA is approving these commitments into the SIP, they are federally enforceable requirements of an applicable implementation plan, which cannot be modified except through a SIP revision adopted by the State after reasonable notice and public hearing and approved by the EPA through notice-and-comment rulemaking. *See* CAA sections 110(l) and 302(q), 5 U.S.C. section 553, and 40 CFR 51.105. Additionally, nothing in the Contingency Measure SIP creates grounds for an affirmative defense that could be used in proceedings to enforce the District's SIP commitments, nor does the Contingency Measure SIP contain any provision that could bar EPA or citizen enforcement of these SIP commitments. We therefore disagree with the commenter's suggestion that the Contingency Measure SIP contains any "director discretion" or "affirmative defense" provision that would undermine the enforceability of these emission reductions. We explain more fully below how the District's SIP commitments can be enforced by the EPA and citizens. *See* Response 10 through Response 15.

In addition, the EPA disagrees with the commenter's assertion that the CARB mobile source control measures relied upon in the Contingency Measure SIP are not creditable as contingency measures. As explained in Response 9 below, the EPA has historically allowed emission reduction credit for California motor vehicle emissions standards that have received waivers of federal preemption pursuant to the waiver approval process of CAA section 209 ("waiver measures"), without requiring California to submit the standards themselves to the EPA for approval as part of the California SIP. *See,* e.g.*,* 76 FR 69896 (November 9, 2011) (final rule partially approving and partially disapproving SJV $PM_{2.5}$ SIP) and 77 FR 12652 (March 1, 2012) (final rule approving SJV 8-hour Ozone SIP). Waiver measures are substituted for federal mobile

source control measures in California, and they become enforceable by the State once the EPA issues a waiver or authorization. Based on considerations of permanence, enforceability, and quantifiability, the EPA continues to believe that it is appropriate and consistent with the CAA to allow California to rely on emission reductions resulting from waiver measures in SIPs. *See* Response 9.

Comment 9: Earthjustice states that most of the CARB mobile source control measures relied upon to provide excess emission reductions are not approved into the SIP and, therefore, are not enforceable by the EPA or through independent citizen enforcement. Earthjustice states that the EPA is aware of this issue from previous comments on the 2008 $PM_{2.5}$ Plan and incorporates those comments by reference.[20] Earthjustice contends that because "the State is free to amend or rescind these measures altogether without EPA oversight," these emission reductions are not creditable as contingency measures.

Response 9: We disagree with the commenter's argument that emission reductions from CARB mobile source control measures may not be credited as contingency measures. The EPA believes that credit for emission reductions from implementation of California mobile source rules that are subject to CAA section 209 waivers ("waiver measures") is appropriate notwithstanding the

[20] Specifically, the commenter states: "As EPA is well aware from previous comments on the 2008 $PM_{2.5}$ Plan (incorporated by reference here), most of the CARB mobile source control measures relied upon here to provide excess emission reductions are not actually approved into the state implementation plan. As a result, they are not enforceable by EPA or through independent citizen enforcement . . . ." *See* letter dated September 27, 2013, from Paul Cort, at 7. Given the context of this comment and the broad range of issues raised by commenters during the EPA's previous rulemaking on the 2008 $PM_{2.5}$ Plan (referred to herein as the "SJV $PM_{2.5}$ SIP"), we assume Earthjustice intended here to incorporate by reference only those of its own comments addressing the EPA's treatment of CARB mobile source control measures in the SIP (*see* letter dated August 12, 2011, from Paul Cort, Staff Attorney, and Sarah Jackson, Research Associate, Earthjustice, "Comments on EPA's Partial Approval/Disapproval of the San Joaquin Valley's State Implementation Plan for Fine Particulate Matter, Docket # EPA-R09-OAR-2010-0516").

fact that such rules are not approved as part of the California SIP. In our July 13, 2011 proposed action on the SJV $PM_{2.5}$ SIP and the technical support document for that proposal, we explained why we believe such credit is appropriate. *See* 76 FR 41338, 41345 (July 13, 2011) and "Technical Support Document and Responses to Comments, Final Rule on the San Joaquin Valley 2008 $PM_{2.5}$ State Implementation Plan," U.S. EPA Region 9, September 30, 2011 (hereafter "2011 Final TSD") at 101-105. Historically, the EPA has granted credit for the waiver measures because of special Congressional recognition, in establishing the waiver process in the first place, of the pioneering California motor vehicle control program and because amendments to the CAA (in 1977) expanded the flexibility granted to California in order "to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare," (H.R. Rep. No. 294, 95th Congr., 1st Sess. 301-2 (1977)). In allowing California to take credit for the waiver measures notwithstanding the fact that the underlying rules are not part of the California SIP, the EPA treated the waiver measures similarly to the Federal motor vehicle control requirements, which the EPA has always allowed States to credit in their SIPs without submitting the program as a SIP revision. As we explained in the 2011 Final TSD (p. 87), credit for Federal measures, including those that establish on-road and nonroad standards, notwithstanding their absence in the SIP, is justified by reference to CAA section 110(a)(2)(A), which establishes the following content requirements for SIPs: "… enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), … , as may be *necessary or appropriate* to meet the applicable requirements of this chapter." (emphasis added). Federal measures are permanent, independently enforceable (by the EPA and citizens), and quantifiable without regard to whether they are approved into a SIP, and thus the EPA has

never found such measures to be "necessary or appropriate" for inclusion in SIPs to meet the applicable requirements of the Act. CAA section 209 establishes a process under which the EPA allows California's waiver measures to substitute for Federal measures, and like the Federal measures for which they substitute, the EPA has historically found, and continues to find, based on considerations of permanence, enforceability, and quantifiability, that such measures are not "necessary or appropriate" for California to include in its SIP to meet the applicable requirements of the Act.

First, with respect to permanence, we note that, to maintain a waiver, CARB's on-road waiver measures can be relaxed only to a level of aggregate equivalence to the Federal Motor Vehicle Control Program (FMVCP) (CAA section 209(b)(1)). In this respect, the FMVCP acts as a partial backstop to California's on-road waiver measures (i.e., absent a waiver, the FMVCP would apply in California). Likewise, Federal nonroad vehicle and engine standards act as a partial backstop for corresponding California nonroad waiver measures. The constraints of the waiver process thus serve to limit the extent to which CARB can relax the waiver measures for which there are corresponding the EPA standards, and thereby serve an anti-backsliding function similar in substance to those established for SIP revisions in CAA sections 110(l) and 193. Meanwhile, the growing convergence between California and EPA mobile source standards diminishes the difference in the emission reductions reasonably attributed to the two programs and strengthens the role of the Federal program in serving as an effective backstop to the State program. In other words, with the harmonization of EPA mobile source standards with the corresponding State standards, the Federal program is becoming essentially a full backstop to most parts of the California program.

Second, as to enforceability, we note that the waiver process itself bestows enforceability onto California to enforce the on-road or nonroad standards for which the EPA has issued the waiver. CARB has as long a history of enforcement of vehicle/engine emissions standards as the EPA, and CARB's enforcement program is equally as rigorous as the corresponding EPA program. The history and rigor of CARB's enforcement program lends assurance to California SIP revisions that rely on the emission reductions from CARB's rules in the same manner as the EPA's mobile source enforcement program lends assurance to other state's SIPs in their reliance on emission reductions from the FMVCP. While it is true that citizens and the EPA are not authorized to enforce California waiver measures under the Clean Air Act (i.e., because they are not in the SIP), citizens and the EPA are authorized to enforce EPA standards in the event that vehicles operate in California without either California or EPA certification.

As to quantifiability, the EPA's historical practice has been to give SIP credit for motor-vehicle-related waiver measures by allowing California to include motor vehicle emissions estimates made by using California's EMFAC (and its predecessors) motor vehicle emissions factor model in SIP inventories. The EPA verifies the emission reductions from motor-vehicle-related waiver measures through review and approval of EMFAC, which is updated from time to time by California to reflect updated methods and data, as well as newly-established emissions standards. (Emission reductions from the EPA's motor vehicle standards are reflected in an analogous model known as MOVES.) The EMFAC model is based on the motor vehicle emissions standards for which California has received waivers from the EPA but accounts for vehicle deterioration and many other factors. The motor vehicle emissions estimates themselves combine EMFAC results with vehicle activity estimates, among other considerations. See the 1982 Bay Area Air Quality Plan, and the related the EPA rulemakings approving the plan (*see*

48 FR 5074 (February 3, 1983) for the proposed rule and 48 FR 57130 (December 28, 1983) for the final rule) as an example of how the waiver measures have been treated historically by the EPA in California SIP actions.[21] The SJV $PM_{2.5}$ SIP was developed using a version of the EMFAC model referred to as EMFAC2007, which the EPA has approved for use in SIP development in California. (73 FR 3464, January 18, 2008). Thus, the emission reductions that are from the California on-road "waiver measures" and that are estimated through use of EMFAC are as verifiable as are the emission reductions relied upon by states other than California in developing their SIPs based on estimates of motor vehicle emissions made through the use of the MOVES model.

Moreover, the EPA's waiver review and approval process is analogous to the SIP approval process. First, CARB adopts its emissions standards following notice and comment procedures at the state level, and then submits the rules to the EPA as part of its waiver request. When the EPA receives new waiver requests from CARB, the EPA publishes a notice of opportunity for public

[21] The EPA's historical practice in allowing California credit for waiver measures notwithstanding the absence of the underlying rules in the SIP is further documented by reference to the EPA's review and approval of a May 1979 revision to the California SIP entitled, "Chapter 4, California Air Quality Control Strategies." In our proposed approval of the 1979 revision (44 FR 60758, October 22, 1979), we describe the SIP revision as outlining California's overall control strategy, which the State had divided into vehicular sources and non-vehicular (stationary source) controls. As to the former, the SIP revision discusses vehicular control measures as including technical control measures and transportation control measures. The former refers to the types of measures we refer to herein as waiver measures, as well as fuel content limitations, and a vehicle inspection and maintenance program. The 1979 SIP revision included several appendices, including appendix 4–E, which refers to "ARB vehicle emission controls included in title 13, California Administrative Code, chapter 3 * * *," including the types of vehicle emission standards we refer to herein as waiver measures; however, California did not submit the related portions of the California Administrative Code (CAC) to the EPA as part of the 1979 SIP revision submittal. With respect to the CAC, the 1979 SIP revision states: "The following appendices are portions of the California Administrative Code. Persons interested in these appendices should refer directly to the code." Thus, the State was clearly signaling its intention to rely on the California motor vehicle control program but not to submit the underlying rules to the EPA as part of the SIP. In 1980, we finalized our approval as proposed (45 FR 63843, September 28, 1980).

hearing and comment and then publishes a decision in the Federal Register following the public comment period. Once again, in substance, the process is similar to that for SIP approval and supports the argument that one hurdle (the waiver process) is all Congress intended for California standards, not two (waiver process plus SIP approval process). Second, just as SIP revisions are not effective until approved by the EPA, changes to CARB's rules (for which a waiver has been granted) are not effective until the EPA grants a new waiver, unless the changes are "within the scope" of a prior waiver and no new waiver is needed. Third, both types of final actions by the EPA—i.e., final actions on California requests for waivers and final actions on state submittals of SIPs and SIP revisions—may be challenged under section 307(b)(1) of the CAA in the appropriate United States Court of Appeals.

In the 2011 Final TSD (pp. 102-103), we indicated that we believe that section 193 of the CAA, the general savings clause added by Congress in 1990, effectively ratified our long-standing practice of granting credit for the California waiver rules because Congress did not insert any language into the statute rendering the EPA's treatment of California's motor vehicle standards inconsistent with the Act. Rather, Congress extended the California waiver provisions to most types of nonroad vehicles and engines, once again reflecting Congressional intent to provide California with the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare. Requiring the waiver measures to undergo SIP review in addition to the statutory waiver process is not consistent with providing California with the broadest possible discretion as to on-road and nonroad vehicle and engine standards, but rather, would add to the regulatory burden California faces in establishing and modifying such standards, and thus would not be consistent with Congressional intent. In short, we believe that

Congress intended California's mobile source rules to undergo only one the EPA review process (i.e., the waiver process), not two.

In summary, the EPA has historically given SIP credit for waiver measures in our approval of attainment demonstrations and other planning requirements such as reasonable further progress and contingency measures submitted by California. We continue to believe that section 193 ratifies our long-standing practice of allowing credit for California's waiver measures notwithstanding the fact they are not approved into the SIP, and correctly reflects Congressional intent to provide California with the broadest possible discretion in the development and promulgation of on-road and nonroad vehicle and engine standards. Further, even without considering section 193, the Act's structure, evolution, and provision for the waiver of federal preemption for California mobile source emissions standards all support the EPA's long-standing interpretation of the CAA to allow California to rely on emission reductions resulting from waiver measures when developing SIP emission inventories, related attainment demonstrations, and contingency measures, even though the waiver measures are not in the SIP itself.

Comment 10: Referencing the District's commitments to monitor, assess, and report on program implementation and to remedy emission reduction shortfalls, Earthjustice characterizes the "contingency measure" as an "enforceable commitment to adopt measures as needed" and asserts that such "committal SIPs" have repeatedly been rejected by the courts. More fundamentally, Earthjustice argues, "this commitment does not create enforceable *emission limits* or *control measures* as required by section 110(a)(2)(A)" but rather "creates an enforceable *duty to adopt* such emission limits or control measures as contingency measures" (emphases in original). Earthjustice contends that this is a plain violation of section 110(a)(2)(A). Moreover, Earthjustice

contends, "this duty already exists under section 172(c)(9), so this proposed contingency measure adds nothing beyond what is already required by law."

Response 10: We disagree with the commenter's characterization of the District's commitments in the Contingency Measure SIP as a "committal SIP." Courts have rejected the EPA's use of the "conditional approval" procedure in CAA section 110(k)(4) to permit states to postpone statutory SIP deadlines by submitting "committal SIPs" that contain no specific remedial measures but instead merely promise to adopt such measures in the future. *See,* e.g.*, Natural Resources Defense Council, Inc. v. EPA, et al,* 22 F.3d 1125 (D.C. Cir. 1994) and *Sierra Club v. EPA,* 356 F.3d 296 (D.C. Cir. 2004). The District's commitments in the Contingency Measure SIP, however, are not promises to adopt measures in the future. Instead, these SIP commitments identify on-going emission reductions and *current* obligations that the District must satisfy on an ongoing basis.[22] Specifically, the District's SIP commitments obligate the District to track its ongoing implementation of the Prop 1B and Carl Moyer Program requirements for specific projects relied upon for SIP credit and to submit reports to the EPA, on an annual basis, that include detailed information regarding the type, location, and duration of each such project. *See* Response 13 (referencing SJVUAPCD Board Resolution No. 13-6-18 at pg. 3 and Rule 9610 at Section 4.5). As explained in supporting materials submitted by the District, all of the projects relied upon for SIP credit in the Contingency Measure SIP are subject to "already-executed,

[22] As we explained in our proposed rule (78 FR 53113, 53115), contingency measures may include Federal, state and local measures already scheduled for implementation that provide emission reductions in excess of those needed to provide for RFP or expeditious attainment. Nothing in the statute precludes a state from implementing such measures before they are triggered. *See, e.g., LEAN* v. *EPA*, 382 F.3d 575 (5th Cir. 2004) (upholding contingency measures that were previously required and implemented where they were in excess of the attainment demonstration and RFP SIP). The EPA believes that its interpretation of the contingency measure requirement in section 172(c)(9) of the Act is reasonable because reductions from these contingency measures are continuing in nature.

legally binding contracts" which ensure that the District's claimed emission reductions are currently being achieved. *See* SJVUAPCD, "Quantification of Contingency Reductions for the *2008 PM2.5 Plan*" (June 20, 2013) at 7, 8. Although the District's SIP commitments include an enforceable requirement to submit substitute measures in the event of a shortfall in expected emission reductions for 2015, this secondary obligation does nothing to undermine the District's current obligation to monitor, assess, and report on its implementation of the Prop 1B and Carl Moyer Program for the identified projects and the actual emission reductions achieved through these projects, consistent with the applicable requirements of Rule 9610. To the contrary, the secondary commitment to adopt and submit substitute measures is provided as an *additional* safeguard to ensure that, if the projects relied upon for SIP credit fail to achieve the expected emission reductions by the applicable implementation deadline (i.e., by December 5, 2015), the District will be required to implement a timely remedy, i.e., to adopt and submit substitute measures that achieve equivalent amounts of emission reductions by the same implementation deadline.[23] In sum, the District's SIP commitments establish current obligations as part of an enforceable sequence of actions leading to compliance with a December 5, 2015 emission reduction obligation, which the EPA or citizens may enforce under the CAA. *See* Response 13.

We also disagree with the commenter's characterization of the District's SIP commitments as a "duty to adopt" emission limits or control measures that violates the requirements of CAA section 110(a)(2)(A). CAA section 110(a)(2)(A) requires that each SIP "include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), . . . as may be necessary or appropriate to meet the applicable requirements of [the Act]." CAA section

[23] *See* n. 46, *infra* (discussing December 5, 2015 deadline for implementation of substitute measures under District's SIP commitment).

110(a)(2)(A); *see also* CAA section 172(c)(6) (establishing substantively identical requirements for nonattainment areas). Thus, in addition to "emission limitations" and "control measures," the Act allows for SIPs to be built upon other "means or techniques" as may be necessary or appropriate to provide for timely attainment of the NAAQS. *See BCCA Appeal Group v. EPA*, 355 F.3d 817 (5th Cir. 2003), *reh'g denied*, 2004 U.S. App. LEXIS 215 (5th Cir., January 8, 2004) (noting expansion of the EPA's authority under section 110(a)(2)(A) following Congress' addition of the "means" and "techniques" and "as appropriate" language as part of the 1990 CAA Amendments). Moreover, as explained in the EPA's proposed rule, both CAA section 110(a)(2)(A) and section 172(c)(6) explicitly provide for the use of economic incentives as one tool for states to use to achieve attainment of the NAAQS. *See* 78 FR 53113, 53118 (quoting reference in CAA section 110(a)(2)(A) to "economic incentives such as fees, marketable permits, and auctions of emissions rights"). Nothing in the Act prohibits the District's use of economic incentives as part of a contingency measure plan that ensures an appropriate level of emission reduction progress if attainment is not achieved and additional planning by the State is needed.

The incentive programs relied upon in the Contingency Measure SIP provide emission reductions in excess of those relied on for RFP or for expeditious attainment in the SJV $PM_{2.5}$ SIP (78 FR 53113, 53123). These incentive programs do not alter any existing control requirement in the applicable SIP and do not interfere with any applicable requirement concerning attainment and RFP or any other applicable requirement of the Act. *Id.* The District has submitted a SIP commitment to comply with detailed requirements of the Prop 1B program and Carl Moyer Program guidelines through a sequence of actions leading to compliance with a December 2015 emission reduction obligation, which the EPA or citizens may enforce under CAA sections 113 and 304, respectively. *See* Response 13. For all of these reasons, we conclude

that the District's SIP commitments are both enforceable "emission standards or limitations" as defined in CAA section 304(f)[24] and appropriate "means or techniques" for achieving NO_x and $PM_{2.5}$ emission reductions under CAA sections 110(a)(2)(A) and 172(c)(6), and that these enforceable commitments are permissible components of a plan submitted to satisfy the attainment contingency measure requirement in CAA section 172(c)(9).

Comment 11: Earthjustice asserts that the EPA's reliance on the "enforceable commitment" to adopt control measures as an enforceable contingency measure is also a plain violation of section 172(c)(9), which requires that contingency measures "take effect . . . without further action by the State or the Administrator." Citing the EPA's interpretive statements in the Addendum (59 FR 41998, August 16, 1994), Earthjustice contends that "[t]he commitment to adopt new rules and measures is a blatant attempt to allow the District to defer adoption of enforceable contingency measures until after the attainment failure occurs" and that "[t]his undermines the entire purpose of the contingency measure requirement." Earthjustice concludes that the incentive program contingency measure therefore cannot be approved.

Response 11: We disagree. As explained in Response 10 above, the District's SIP commitments contain both a current obligation for the District to monitor, assess, and report on its ongoing implementation of the Prop 1B and Carl Moyer Program requirements with respect to specified projects and a secondary obligation for the District to implement a timely remedy, should the identified projects fail to achieve the expected emission reductions. These SIP obligations take effect without further action by the State or the Administrator, in accordance with CAA section 172(c)(9).

[24] *See* n. 31, *infra.*

Additionally, consistent with the EPA's longstanding interpretation of the contingency measure requirement in CAA section 172(c)(9) as requiring that all actions needed to effect full implementation of contingency measures occur within 60 days after the EPA notifies the State of a failure to attain the NAAQS by the applicable attainment date,[25] the District's SIP commitments ensure that all actions needed to effect full implementation of the incentive-based emission reductions will occur no later than December 5, 2015. Should the EPA find based on the 2014 annual demonstration report that the required amounts of NO_x and $PM_{2.5}$ emission reductions may *not* continue through 2015 as projected, the EPA will promptly notify the District of its potential obligation to implement substitute measures consistent with its Board commitment no later than December 5, 2015, so that the District has ample time for any rulemakings that may be necessary to meet this implementation deadline. Subsequently, should the EPA determine that the SJV area has failed to attain the 1997 $PM_{2.5}$ NAAQS by the applicable attainment date of April 5, 2015,[26] the District will be obligated under its SIP commitment either to confirm that the Prop 1B and Carl Moyer Program projects identified in the 2014 and 2015 annual demonstration reports will continue to achieve the required amounts of NO_x and $PM_{2.5}$ emission reductions in December 2015 as projected, or to adopt and submit substitute measures achieving equivalent amounts of emission reductions (4.15 tpd of NO_x

[25] *See* General Preamble at 13512, 13543-13544 and the Addendum at 42014-42015 ("EPA generally expects all actions needed to effect full implementation of the [contingency] measures to occur within 60 days after EPA notifies the State of the area's failure [to attain]").
[26] Under CAA section 179(c), the EPA must determine whether the SJV area has attained the 1997 $PM_{2.5}$ NAAQS "as expeditiously as practicable" and no later than 6 months after the applicable attainment date, based on the area's air quality as of the attainment date. Because the applicable attainment date for the 1997 $PM_{2.5}$ NAAQS in the SJV area is April 5, 2015, the EPA must make this determination regarding attainment for the SJV no later than October 5, 2015.

reductions and 0.10 tpd of direct $PM_{2.5}$ reductions) no later than December 5, 2015.[27] *See* SJVUAPCD Board Resolution No. 13-6-18 at p. 3.

Earthjustice suggests that only those "substitute" measures that the District would be obligated to implement in the event of an emission reduction shortfall constitute enforceable contingency measures, and that the EPA's approval of this SIP commitment therefore impermissibly allows the District to delay adoption of required measures. As discussed above, however, the enforceable contingency measure here is the District's SIP commitment in its entirety, which includes a *current* obligation to monitor, assess, and report on the District's ongoing implementation of the Prop 1B and Carl Moyer Program requirements with respect to specified projects which collectively are expected to achieve 4.15 tpd of NO_x reductions and 0.10 tpd of direct $PM_{2.5}$ reductions in 2015. This current obligation constitutes an enforceable measure in itself, and should the District fail to fully account for the required amounts of NO_x and direct $PM_{2.5}$ emission reductions in annual demonstration reports submitted in 2014 and 2015 that satisfy the applicable requirements of Rule 9610, the EPA may make a finding of failure to implement the SIP under CAA section 179(a) and either the EPA or citizens may take

[27] *See* n. 46, *infra* (discussing December 5, 2015 deadline for implementation of substitute measures under District's SIP commitment). In our proposed rule, we erroneously stated that following an EPA finding that the SJV area has failed to attain the 1997 $PM_{2.5}$ NAAQS, the District would be obligated to verify through the *2016* annual demonstration report whether the required amounts of NO_x and direct $PM_{2.5}$ reductions had occurred or to adopt and submit substitute rules consistent with its Board commitment (78 FR 53113, 53122). We hereby clarify that the *2014* annual demonstration report (not the 2016 report) is the vehicle through which the District must either demonstrate that the required amounts of emission reductions will continue through 2015 or identify substitute measures to be implemented by December 5, 2015. *See* Rule 9610, Section 4.4 (requiring that each annual demonstration report "identify and quantify SIP commitment shortfalls, if any, and remedies for addressing said shortfalls"). We note, however, that under Rule 9610 the District remains subject to an ongoing obligation to retrospectively assess the performance of its incentive programs for potential future enhancements and that the 2016 annual demonstration report should, therefore, contain information adequate to verify whether the required amounts of NO_x and direct $PM_{2.5}$ reductions occurred in 2015. *See* Rule 9610, Section 4.7.

enforcement action under CAA section 113 or 304, respectively. *See* Response 12 and Response 13. The secondary obligation to adopt and submit "substitute" measures is an additional safeguard to be effectuated *only if* the District fails to satisfy its current obligation to monitor, assess, and report on its ongoing emission reduction responsibilities. We therefore disagree with the commenter's assertion that the District's SIP commitment allows it to "defer adoption of enforceable contingency measures until after the attainment failure occurs."

In sum, the District's SIP commitments establish current obligations on the District to take action well before the applicable attainment date to achieve the required emission reductions by December 5, 2015, whether through annual demonstration reports submitted in 2014 and 2015 or through adoption and submission of substitute measures to be implemented by December 5, 2015. Given the District's long history of successful implementation and enforcement of Prop 1B and Carl Moyer Program grants and the detailed requirements in the associated incentive program guidelines, as discussed in our technical support document for the proposed rule (*see* U.S. EPA Region 9, "Technical Support Document, Proposed Approval of Clean Air Act Section 172(c)(9) Contingency Measures, San Joaquin Valley State Implementation Plan for Attainment of the 1997 $PM_{2.5}$ Standards," August 15, 2013 (hereafter "Proposal TSD")) and further in these responses to comments, we expect that the District's implementation of these program requirements for the identified projects will achieve the District's claimed 4.15 tpd of NO_x reductions and 0.10 tpd of direct $PM_{2.5}$ reductions in 2015. However, should the EPA find based on documentation submitted by the District in 2014 that the required emission reductions may not occur in 2015 as projected, the District will be obligated under its SIP commitment to adopt and submit substitute measures achieving the required emission reductions by December 5, 2015. We find these SIP commitments adequate to ensure that an appropriate level of emission

reduction progress will continue to be made should the SJV area fail to attain the 1997 $PM_{2.5}$ NAAQS by the applicable attainment date of April 5, 2015.

Comment 12: Earthjustice asserts that the incentive-based emission reductions are unenforceable by the EPA or citizens and that the EPA itself has described such emission reductions as "not enforceable against individual sources," "voluntary," and subject to a cap on SIP credit.

Response 12: We disagree with the commenter's assertion that these emission reductions are unacceptable because they are unenforceable by the EPA or citizens. As the commenter notes, the EPA has described "voluntary" measures as those that are not directly enforceable against individual sources and has recommended presumptive limits (sometimes referred to as "caps") on the credit that may be allowed in a SIP for such measures. Such voluntary measures may be credited for SIP purposes only where the State submits other enforceable mechanisms to ensure that the required emission reductions are achieved, subject to EPA and citizen enforcement under the CAA. As discussed further below, the incentive-based emission reductions relied upon in the Contingency Measure SIP fall within the EPA's presumptive limits on credit for voluntary measures and are consistent with the EPA's recommendations for voluntary mobile source emission reduction programs. Additionally, these incentive-based emission reductions are consistent with the EPA's recommendations for discretionary economic incentive programs. We discuss below EPA's guidance on both voluntary measures and economic incentive programs (EIPs) and our rationale for concluding that the Contingency Measure SIP adequately addresses the applicable requirements of the Act, as described in these guidance documents.

The EPA believes that it is appropriate and consistent with the Act to allow a limited percentage of the total emission reductions needed to satisfy any statutory requirement to come from "voluntary" or "emerging" measures or other nontraditional measures and programs, where

the State commits to certain safeguards and satisfies the statutory criteria for SIP approval. *See,* e.g.*,* "Guidance on Incorporating Voluntary Mobile Source Emission Reduction Programs in State Implementation Plans (SIPs)," October 24, 1997 (hereafter "1997 VMEP") at 4-7; "Incorporating Emerging and Voluntary Measures in a State Implementation Plan," September 2004 (hereafter "2004 Emerging and Voluntary Measures Policy") at 8-12; and "Guidance on Incorporating Bundled Measures in a State Implementation Plan," August 16, 2005 (hereafter "2005 Bundled Measures Guidance") at 7-12. The EPA has described "voluntary measures" as measures or strategies that are not directly enforceable against individual sources, and "emerging measures" as those that are more difficult to accurately quantify than traditional SIP emission reduction measures.[28] *See* 1997 VMEP at 4; 2004 Emerging and Voluntary Measures Policy at 13, 19; and 2005 Bundled Measures Guidance at 2. "Voluntary" measures for stationary and area sources may include consumer-oriented programs to reduce the use of high-emitting paints or other consumer products during the ozone season; mechanisms to encourage pollution prevention or process changes at unregulated emission points; and voluntary wood stove changeout programs. *See* 2004 Emerging and Voluntary Measures Policy at 19, 20. "Voluntary" mobile source emission reduction programs (VMEPs)[29] may include employer-based transportation management programs to manage employee commute and travel behavior; area-wide rideshare incentives to encourage commuters to use alternatives to single-occupant vehicles; and auto restricted zones, no-drive days, or other limitations on vehicle use in a given geographic area. *See* 1997 VMEP at Attachment 1. "Emerging" measures include activities that

[28] A measure can be both emerging and voluntary. *See* 2004 Emerging and Voluntary Measures Policy at 1.

[29] A voluntary mobile source emission reduction program (VMEP) is a mechanism that supplements traditional emission reduction strategies through voluntary, nonregulatory changes in local transportation sector activity levels or changes in in-use vehicle and engine fleet composition, among other things. *See* 1997 VMEP at 3.

indirectly reduce emissions by promoting more efficient energy use or that promote renewable resources (e.g., use of solar power, wind power, or biomass) and activities that improve air quality by means other than emission reductions (e.g., heat island measures that reduce criteria pollutant concentrations by lowering ambient temperatures). *See* 2004 Emerging and Voluntary Measures Policy at 14-15. Where a State submits a VMEP or other voluntary or emerging measure for SIP approval, the EPA evaluates it for consistency with four fundamental "integrity elements" and with SIP attainment and reasonable further progress (RFP) requirements, and to ensure that it does not interfere with other requirements of the Act. *See* 1997 VMEP at 6; *see also* 78 FR 53113, 53118 and Proposal TSD at 22-24.

In light of the increasing incremental cost associated with further stationary and mobile source emission reductions and the difficulty of identifying such additional sources of emission reductions, the EPA encourages innovative approaches to generating emission reductions through voluntary and emerging measures and other nontraditional measures and programs. *See* 1997 VMEP at 4-5; 2004 Emerging and Voluntary Measures Policy at 9; and 2005 Bundled Measures Guidance at 7. The EPA also recognizes, however, that these nontraditional measures raise novel issues related to enforceability and quantification of the associated emission reductions. Accordingly, the EPA's policies addressing nontraditional measures provide for some flexibility in meeting established SIP requirements for enforceability and quantification, provided the State takes clear responsibility for ensuring that the emission reductions necessary to meet applicable CAA requirements are achieved. *See* 1997 VMEP at 5-7; 2004 Emerging and Voluntary Measures Policy at 9; 2005 Bundled Measures Guidance at 7; and "Roadmap for Incorporating Energy Efficiency/Renewable Energy Policies and Programs into State and Tribal Implementation Plans," July 2012 (hereafter "2012 Roadmap for EE/RE Programs") at 37-38.

Importantly, the EPA has consistently stated that any voluntary or other nontraditional measure submitted for SIP credit must be accompanied by an appropriate enforceable "backstop" commitment from the State to monitor emission reductions achieved and to rectify any shortfall in a timely manner. *See,* e.g.*,* 1997 VMEP at 4-5; 2004 Emerging and Voluntary Measures Policy at 8-12; 2005 Bundled Measures Guidance at 7-12; and "Guidance on SIP Credits for Emission Reductions from Electric-Sector Energy Efficiency and Renewable Energy Measures," August 5, 2004 (hereafter "2004 Electric-Sector EE/RE Guidance") at 6-7. Thus, although the State is not necessarily responsible for implementing a program dependent on voluntary actions, the State is obligated to monitor, assess and report on the implementation of any such program and the associated emission reductions, and to remedy emission reduction shortfalls in a timely manner should the voluntary measure not achieve the projected emission reductions. *See* 1997 VMEP at 6-7. The EPA believes that voluntary measures, in conjunction with the enforceable commitment to monitor emission reductions achieved and rectify any shortfall, meet the SIP control measure requirements of the Act. *See* 1997 VMEP at 5 and 2004 Emerging and Voluntary Measures Policy at 8-9.

Given the innovative nature of these nontraditional measures, the EPA has recommended "presumptive" limits on the amounts of emission reductions from such measures that may be credited in a SIP. Specifically, for VMEPs, the EPA has identified a presumptive limit of three percent (3%) of the total projected future year emission reductions required to attain the appropriate NAAQS, and for any particular SIP submittal to demonstrate attainment or maintenance of the NAAQS or progress toward attainment (RFP), 3% of the specific statutory requirement. *See* 1997 VMEP at 5. As explained in the 2001 EIP Guidance, the EPA recommended this 3% cap (per pollutant) on the credit allowed for VMEPs because states are

"not required to play a direct role in implementing these programs, the programs are not directly enforceable against participating parties, and there may [be] less experience in quantifying the emission benefits from these programs." 2001 EIP Guidance at 158. For voluntary stationary and area source measures, the EPA has identified a presumptive limit of 6% of the total amount of emission reductions required for RFP, attainment, or maintenance demonstration purposes. *See* 2004 Emerging and Voluntary Measures Policy at 9 and 2005 Bundled Measures Guidance at 8. These limits are presumptive in that the EPA may approve emission reductions from voluntary or other nontraditional measures in excess of the presumptive limits where the State provides a clear and convincing justification for such higher amounts, which the EPA would review on a case-by-case basis. *See id.*

The incentive-based emission reductions in the Contingency Measure SIP are consistent with the EPA's recommendations in the 1997 VMEP. First, the Contingency Measure SIP and related support documents contain the State's and District's demonstrations that the claimed incentive-based emission reductions are quantifiable, surplus, enforceable and permanent consistent with EPA policy. *See* Proposal TSD at 29-42. Second, the SIP submission contains enforceable commitments by the District to monitor, assess and report on its implementation of specified portions of the Carl Moyer and Prop 1B programs and the associated emission reductions, and to remedy emission reduction shortfalls in a timely manner should these programs fail to achieve the projected amounts (i.e., 4.15 tpd of NO_x reductions and 0.10 tpd of direct $PM_{2.5}$ reductions) in 2015. *See* 78 FR 53113, 53121-53122 and Proposal TSD at 42-44. These commitments become federally enforceable by the EPA under CAA section 113[30] and by citizens under CAA

[30] Section 113 of the CAA authorizes the EPA to issue notices and compliance orders, assess administrative penalties, and bring civil actions against any "person," including a State, who "has violated or is in violation of any requirement or prohibition of an applicable implementation

section 304[31] upon the EPA's approval of the commitments into the SIP. Thus, although neither the EPA nor citizens can enforce these emission reductions directly against sources, as a result of today's action the EPA and citizens may enforce these emission reductions against the District,[32] pursuant to the District's SIP-approved commitments. *See* Proposal TSD at 42-44; *see also* Response 13 below (discussing EPA and citizen enforcement of SIP commitments under the CAA). Third, the incentive-based emission reductions relied upon in the Contingency Measure SIP amount to less than two percent of the total projected NO_x reductions and less than one percent of the total projected $PM_{2.5}$ reductions needed to attain the 1997 $PM_{2.5}$ NAAQS in the San Joaquin Valley by April 5, 2015 (78 FR 53113, 53121, n. 29). These amounts of emission reductions fall within the EPA's recommended 3% cap (per pollutant) on the credit allowed for VMEPs. Finally, the incentive-based emission reductions do not interfere with requirements of

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plan. . . ." CAA section 113(a)(1)-(2), 42 U.S.C. 7413(a)(1)-(2); CAA section 302(e), 42 U.S.C. 7602(e) (defining "person" to include a State or political subdivision thereof). "Applicable implementation plan" is defined in CAA section 302(q), in relevant part, as "the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 110 of [title I of the Act]. . . and which implements the relevant requirements of [the Act]." 42 U.S.C. 7602(q).

[31] CAA section 304(a)(1) authorizes any person to bring a civil action against any "person," including a State, "who is alleged to have violated or to be in violation of . . . an emission standard or limitation. . . ." 42 U.S.C. 7604(a)(1); CAA section 302(e), 42 U.S.C. 7602(e) (defining "person" to include a State or political subdivision thereof). An "emission standard or limitation" is defined in section 304(f), in relevant part, to mean "a schedule or timetable of compliance" which is in effect under the Act "or under an applicable implementation plan." 42 U.S.C. 7604(f)(1). "Schedule and timetable of compliance" is broadly defined in section 302(p) to mean "a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard." 42 U.S.C. 7602(p).

[32] The District Governing Board's commitments are also enforceable against the State through CARB's adoption of the Contingency Measure SIP. *See* State of California, Air Resources Board, "San Joaquin Valley PM2.5 Contingency Measures Update," Resolution 13-30 (June 27, 2013) ("the Board hereby adopts the PM2.5 Contingency Measures Update as a revision to the California SIP and directs the Executive Officer to transmit it to the U.S. EPA" as a SIP revision). Throughout this document, references to enforcement against the District include enforcement against the State, which has responsibility for ensuring adequate implementation of the SIP consistent with CAA section 110(a)(2)(E).

the CAA and are consistent with the attainment and RFP requirements in the approved SJV $PM_{2.5}$ SIP (78 FR 53113, 53123 (discussing the EPA's evaluation of the Contingency Measure SIP in accordance with CAA section 110(l)).

Additionally, as explained in our proposed rule, the EPA evaluated the incentive-based emission reductions in the Contingency Measure SIP in accordance with the Agency's guidance on discretionary economic incentive programs (EIPs)[33], specifically "financial mechanism EIPs" (78 FR 53113, 53118, August 28, 2013). The EPA's approach to discretionary EIPs differs in several respects from its approach to "voluntary" and "emerging" measures. A discretionary EIP uses market-based strategies to encourage the reduction of emissions from stationary, area, and/or mobile sources in an efficient manner. *See* 2001 EIP Guidance at 3. To qualify for approval as a discretionary EIP, emission reductions or actions leading to reductions must be enforceable either by the State or by the EPA, and the State must be directly responsible for ensuring that program elements are implemented. *See id.* at 157-158 (states may use the 2001 EIP Guidance where "[a]ctions and/or emission reductions by identifiable sources are enforceable by [the State] and/or by the EPA"). Additionally, the emission reductions resulting from an EIP must be quantifiable with a higher degree of certainty than the reductions resulting from an emerging measure. *See* 2004 Emerging and Voluntary Measures Policy at 5. Given these more rigorous approval criteria, the EPA's presumptive limits on SIP credit for voluntary and emerging measures do not apply to discretionary EIPs. *See* 2001 EIP Guidance at 158 ("[states]

[33] The EPA has promulgated regulations for "statutory EIPs" required under CAA sections 182(g), 187(d)(3), or 187(g) and has issued guidance for "discretionary EIPs." *See generally* 40 CFR part 51, subpart U; 59 FR 16690 (April 7, 1994); and 2001 EIP Guidance. A "discretionary EIP" is any EIP submitted to the EPA as an implementation plan revision for purposes other than to comply with the statutory requirements of CAA sections 182(g)(3), 182(g)(5), 187(d)(3), or 187(g) (40 CFR 51.491). In today's action, we address only the requirements that apply to discretionary EIPs as the Contingency Measure SIP does not contain any statutory EIP.

may use the EIP guidance to implement programs which will generate emission reductions beyond the 3 percent limit"); *see also* 2004 Emerging and Voluntary Measures Policy at 6 ("EIP measures are not subject to a percentage limitation that applies to voluntary measures").

A "financial mechanism EIP" is an EIP that indirectly reduces emissions by increasing costs for high emitting activities – e.g., through subsidies targeted at promoting pollution-reducing activities or products. *See* 2001 EIP Guidance at 119-122 (Chapter 8.0). The EPA has identified several attributes that may make subsidy financial mechanism EIPs successful, including: (1) the relevant governmental body possesses legal authority to provide subsidies; (2) the subsidies address activities reasonably related to actual emissions or potential emissions; (3) where projected emission reductions are based on changes in behavior, methods for verifying that such reductions have taken place to the degree projected are generally accepted as unbiased and trustworthy; and (4) if needed, adequate penalty provisions are in place to ensure that the subsidy is used as expected. *See* 2001 EIP Guidance at 27 ("Attributes That Make Subsidy Financial Mechanism EIPs Successful").

As explained further below, the incentive-based emission reductions in the Contingency Measure SIP are consistent with the EPA's recommendations for "financial mechanism EIPs" in the 2001 EIP Guidance. First, CARB and the District are directly responsible for ensuring that the Prop 1B program and Carl Moyer Program are implemented in accordance with State law. *See* 2010 Prop 1B guidelines at 1-4 ("Overview") and 2011 Carl Moyer Program Guidelines at Chapter 1 ("Program Overview"). Second, these incentive funds address activities reasonably related to actual or potential air pollutant emissions by requiring grant recipients to purchase and operate newer, cleaner vehicles or equipment in place of older, more-polluting vehicles or equipment, subject to detailed contract requirements. *See* Response 13. Third, the 2008 and 2010

Prop 1B guidelines and the 2011 Carl Moyer Program Guidelines establish a number of methods for verifying that projected emission reductions have taken place through compliance with the terms and conditions of each funding contract. *See* Response 13 and Response 14. Finally, under the applicable guidelines, actions by grantees that lead to emission reductions are directly enforceable by the State and/or the District – e.g., CARB and/or the District may assess fiscal penalties and take certain corrective actions where contract violations are identified[34] -- and EPA and citizens may, in turn, enforce the annual reporting and emission reduction obligations against the District. *See* Response 13 and Response 14. Consistent with the EPA's recommendations for "financial mechanisms EIPs," these provisions in the 2008 and 2010 Prop 1B guidelines and the 2011 Carl Moyer Program Guidelines are adequate to ensure that program funds are used as expected – i.e., to reduce emissions from higher-polluting vehicles and equipment by replacing them with newer, lower-polluting equipment and vehicles.

In sum, although the incentive-based emission reductions in the Contingency Measure SIP are not directly enforceable against individual sources by the EPA or citizens, the *District* may enforce specific emissions-reducing actions against individual sources, and the EPA and citizens may, in turn, enforce the emission reduction obligations against the District, pursuant to the District's SIP-approved commitments. Thus, whether the incentive-based emission reductions are characterized as dependent upon "voluntary" measures (*i.e.,* a VMEP) or resulting from a discretionary "financial mechanism EIP," we find the District's SIP commitments in the Contingency Measure SIP adequate to ensure that the EPA and citizens may enforce these

[34] These State and District enforcement authorities distinguish both the Prop 1B program and the Carl Moyer Program from an entirely "voluntary" measure, which depends on actions by individual sources that cannot be enforced. *See, e.g.,* 2001 EIP Guidance at 157-58 (describing VMEPs as "innovative mobile source air quality programs that are voluntary or that are operated by a non-governmental entity" and distinguishing these from EIPs, for which the State is "directly responsible for ensuring that program elements are implemented").

emission reductions under the Act. The Contingency Measure SIP and related support documents also adequately address all other applicable requirements of the CAA and the EPA's recommendations as set forth in the 1997 VMEP and 2001 EIP Guidance (78 FR 53113, 53118-53122, August 28, 2013). Given all of these considerations, we find that the incentive-based emission reductions in the Contingency Measure SIP satisfy the statutory criteria for SIP approval.

Comment 13: Citing both the 2001 EIP Guidance and the 2004 Emerging and Voluntary Measures Policy, Earthjustice highlights seven criteria for enforceability and asserts that the emission reductions identified in the Contingency Measure SIP do not meet these criteria.

Response 13: As an initial matter, we note that both the 2001 EIP Guidance and the 2004 Emerging and Voluntary Measures Policy set forth the EPA's recommendations for EIPs or voluntary measures submitted for SIP purposes and do not establish binding legal requirements. *See* 2001 EIP Guidance at 12 and 19 (stating that the EPA would determine through notice-and-comment rulemaking whether a particular EIP submission meets the applicable CAA requirements) and 2004 Emerging and Voluntary Measures Policy at 2. Moreover, the 2004 Emerging and Voluntary Measures Policy does not apply to mobile emission sources such as on-road and non-road vehicles.[35] *See* 2004 Emerging and Voluntary Measures Policy at 5. We have, however, evaluated the incentive-based emission reductions in the Contingency Measure SIP for consistency with the fundamental "integrity elements" outlined in the 2001 EIP Guidance, the 2004 Emerging and Voluntary Measures Policy, and other guidance on innovative measures as part of our evaluation of the SIP submission in accordance with CAA requirements.

[35] The Contingency Measure SIP relies on emission reductions from incentive programs that apply only to mobile emission sources – specifically, "on-road vehicle replacement" projects funded through the Prop 1B program and "off-road vehicle replacement" projects funded through the Carl Moyer Program (78 FR 53113, 53120).

Based on this evaluation, we disagree with the commenter's assertion that the incentive-based emission reductions in the Contingency Measure SIP fail to adequately address the enforceability recommendations provided in EPA policy. As the commenter notes, the 2001 EIP Guidance identifies enforceability considerations that are substantively identical to the recommendations in the 2004 Emerging and Voluntary Measures Policy. According to the 2001 EIP Guidance, emission reductions use, generation, and other required actions are enforceable if: (1) they are independently verifiable; (2) program violations are defined; (3) those liable for violations can be identified; (4) the State and the EPA maintain the ability to apply penalties and secure appropriate corrective actions where applicable; (5) citizens have access to all the emissions-related information obtained from the source; (6) citizens can file suits against sources for violations; and (7) they are practicably enforceable in accordance with other EPA guidance on practicable enforceability. *See* 2001 EIP Guidance at 35-36.

The actions required of grantees under the applicable portions of the Prop 1B and Carl Moyer Program guidelines, as discussed in our proposed rule, the Proposal TSD, and further below, adequately address these enforceability recommendations. First, the required actions are independently verifiable through (1) pre-project and post-project on-site inspections (with photographic documentation) that the District and/or CARB must carry out pursuant to the applicable guidelines, and (2) documents that each grantee is required to maintain and/or submit to the District in accordance with detailed contract provisions. *See generally* 2008 Prop 1B guidelines at Section III.D ("Local Agency Project Implementation Requirements"), Section IV ("General Equipment Project Requirements"), and Appendix A, Section C ("Recordkeeping Requirements") and Section D ("Annual Reporting Requirements"); 2010 Prop 1B guidelines at Section IV.A ("Project Implementation Requirements"), Section VI ("General Equipment

Project Requirements"), and Appendix A, Section F ("Recordkeeping Requirements") and Section G ("Annual Reporting Requirements"); and 2011 Carl Moyer Program Guidelines, Part I, Chapter 3 ("Program Administration").

For example, the 2008 and 2010 Prop 1B guidelines require, among other things, that (1) all project applications[36] include documentation of current equipment and activity information (e.g. engine make, model, horsepower and fuel type, annual vehicle miles of travel (VMT) in California, and estimated percentage of annual VMT in trade corridors); (2) that the District conduct a "pre-inspection" of each application deemed eligible for funding, to verify information regarding the baseline engine, vehicle, or equipment; (3) that the District conduct a "post-inspection" of each funded project to record, among other things, identifiers and specifications for the new engine/equipment (e.g., VIN numbers for new trucks, serial numbers for new engines), verification that the new engine/equipment is operational and consistent with the equipment described in the project application, and verification of the destruction of the old/replaced equipment, where applicable; and (4) that the District's pre-inspection and post-inspection project files include photographic documentation of each piece of equipment being inspected, including an engine serial number, visible distinguishing identification (e.g., a license plate), and a full view of the equipment. *See* Proposal TSD at 30-35; *see also* 2008 Prop 1B guidelines at Section III.D.8 ("Equipment project pre-inspections'), Section III.D.14 ("Equipment project post-inspections), Section IV.D ("Equipment Project Application Requirements") and Appendix A, Section F ("Application Information"); and 2010 Prop 1B

[36] Each project application must be incorporated by reference into the equipment project contract, which the equipment owner must maintain for at least two years after equipment project ends or three years after final payment, whichever is later. *See* 2008 Prop 1B guidelines at Section III.D.10 ("Equipment project contracts") and 2010 Prop 1B guidelines at Section IV.A.11 ("Equipment project contracts").

guidelines at Section IV.A.10 ("Equipment project pre-inspections'), Section IV.A.16 ("Equipment project post-inspections), Section VI.D ("Equipment Project Application Requirements") and Appendix A, Section F ("Application Information").

Similarly, the 2011 Carl Moyer Program Guidelines require, among other things, that (1) all project applications[37] include documentation of existing engine usage in previous years (e.g. miles traveled, hours operated, or fuel consumed per year); (2) that the District conduct a "pre-inspection" of each application deemed eligible for funding, to verify information regarding the baseline engine, vehicle, or equipment; (3) that the District conduct a "post-inspection" of each funded project to record, among other things, information regarding the new engines, vehicles/equipment, and retrofit devices as needed to provide a basis for emission calculations and to ensure contract enforceability; and (4) that the District's pre-inspection and post-inspection project files include photographic documentation of the engine, vehicle, or equipment information, including a legible serial number and/or other identifying markings. *See* Proposal TSD at 37-42; *see also* 2011 Carl Moyer Program Guidelines, Part I, Chapter 3, at Section W ("Minimum Project Application Requirements"), Section AA ("Project Pre-Inspection"), and Section BB ("Project Post-Inspection").

Second, the applicable portions of the 2008 and 2010 Prop 1B guidelines and the 2011 Carl Moyer Program guidelines specifically define the required elements of each contract and the types of actions that constitute violations of such contracts. For example, under the 2008 and

[37] A project application that is "accurate and complete" may be included as an attachment to the contract to satisfy the "project specification" requirements of the 2011 Carl Moyer Program Guidelines. *See* 2011 Carl Moyer Program Guidelines at Section Z.6 (stating that "[a]ll contracts must include detailed information on the baseline and new vehicles, equipment, and/or engines that were used in the project cost-effectiveness calculation"). Each contract must be retained by the grantee for at least two years after contract expiration or three years after final project payment, whichever is later. *See id.* at Z.10 ("On-Site Inspections and Audits").

2010 Prop 1B guidelines, each equipment project contract must include: (1) a unique "tracking number"; (2) the equipment owner's contact information; (3) the original application submitted by the equipment owner; (4) requirements for the equipment owner to submit reports to the local agency annually or biennially[38]; (5) the equipment owner's agreement to allow ongoing evaluations and audits of equipment and documentation by the District, CARB, or their designated representative(s); and (6) requirements for the equipment owner to retain all records pertaining to the program (i.e., invoices, contracts, and correspondence) for at least two years after equipment project ends or three years after final payment, whichever is later. *See* 2008 Prop 1B guidelines at Section III.D.10 ("Equipment project contracts") and 2010 Prop 1B guidelines at Section IV.A.11 ("Equipment project contracts"); *see also* Proposal TSD at 30-32. Additionally, under the same guidelines, the following actions (among others) are specifically identified as contract violations: (1) failure to meet the terms and conditions of an executed equipment project contract, including equipment operating conditions and geographic restrictions; (2) failure to allow for an electronic monitoring device or tampering with an installed device or data; (3) insufficient, incomplete, or faulty equipment project documentation; and (4) failure to provide required documentation or reports in a timely manner. *See* 2008 Prop 1B guidelines at Section IV.G ("Equipment Project Non-Performance") and 2010 Prop 1B guidelines at VI.I ("Equipment Project Non-Performance"); *see also* Proposal TSD at 30-32.

[38] Under the 2008 Prop 1B guidelines, all grant recipients are required to submit reports to the District annually. *See* 2008 Prop 1B guidelines at Appendix A ("Trucks Serving Ports and Intermodal Rail Yards"), Section D ("Annual Reporting Requirements"). The 2010 Prop 1B guidelines also require annual reports except that certain owners of equipment with PM retrofits with a 2-year contract may report at the end of the 2-year project life. *See* 2010 Prop 1B guidelines, Appendix A ("Heavy Duty Diesel Trucks"), Section G ("Annual Reporting Requirements").

Similarly, under the 2011 Carl Moyer Program Guidelines, each equipment project contract must include: (1) the name and contact information of the grantee; (2) specified timeframes for "project completion" (the date the project post-inspection confirms that the project has become operational) and "project implementation" (the project life used in the project cost-effectiveness calculation); (3) detailed information on both baseline and new vehicles, equipment, and/or engines, including documentation adequate to establish historical annual usage; (4) requirements for the grantee to maintain the vehicle, equipment and/or engine according to the manufacturer's specifications for the life of the project; (5) annual reporting requirements; (6) a provision authorizing the District, CARB, and their designees to conduct fiscal audits and to inspect the project engine, vehicle, and/or equipment and associated records during the contract term, and (7) requirements to maintain and retain project records for at least two years after contract expiration or three years after final project payment, whichever is later. *See* 2011 Carl Moyer Program Guidelines, Part I, Chapter 3 at Section Z ("Minimum Contract Requirements"); *see also* Proposal TSD at 37-38 (describing requirements for Off-Road Compression Ignition engine replacement projects in 2011 Carl Moyer Program Guidelines, Part I, Chapter 9 at Section C ("Project Criteria")). Additionally, the 2011 Carl Moyer Program Guidelines explicitly require that each contract "specify that by executing the contract, the grantee understands and agrees to operate the vehicle, equipment, and/or engine according to the terms of the contract" and describe the potential repercussions to the grantee for non-compliance with contract requirements. *See* 2011 Carl Moyer Program Guidelines, Part I, Chapter 3 at Section Z.11 ("Repercussions for Non-Performance") and Section FF ("Nonperforming Projects").[39] The 2011

[39] The 2011 Carl Moyer Program Guidelines authorize the District to grant a "waiver" to a grantee who demonstrates to the District's satisfaction that certain conditions justify contract noncompliance for a defined period. *See* 2011 Carl Moyer Program Guidelines, Part I, Chapter 3

Carl Moyer Program Guidelines also specifically identify types of actions on the part of the District that CARB may treat as violations of program requirements – e.g., misuse of Carl Moyer Program funds and insufficient, incomplete, or inaccurate project documentation. *See* 2011 Carl Moyer Program Guidelines at Section U ("Program Non-Performance").

Third, grantees that are liable for violations of these contract provisions can be identified by the State and/or District and, through the annual demonstration reports submitted to the EPA, by the EPA and citizens as well. Specifically, as discussed above, under the 2008 Prop 1B guidelines, the 2010 Prop 1B guidelines, and the 2011 Carl Moyer Program guidelines, each contract executed by the District must require the grantee to maintain project records for at least two years after contract expiration or three years after final project payment, whichever is later, and to submit annual or biennial reports to the District. *See* 2008 Prop 1B guidelines at Section III.D.10 ("Equipment project contracts"), 2010 Prop 1B guidelines at Section IV.A.11 ("Equipment project contracts")[40], and 2011 Carl Moyer Program Guidelines, Part I, Chapter 3 at Section Z ("Minimum Contract Requirements"); *see also* Proposal TSD at 30-32 and 37-40. Additionally, the 2008 and 2010 Prop 1B guidelines require that each contract contain a provision stating the equipment owner's agreement to allow ongoing evaluations and audits of equipment and documentation by the District, CARB, or their designated representative(s), and the 2011 Carl Moyer Program Guidelines similarly require that all contracts authorize the District, CARB, or their designees to conduct fiscal audits of the project and/or to inspect the project engine, vehicle, and/or equipment and associated records during the contract term. *See id.*

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at Section FF.4(D). We note that, for any project that the District has relied upon for SIP credit, Section 4.3 of Rule 9610 requires the District to annually adjust its calculation of SIP-creditable emission reductions to reflect periods of noncompliance under any such waiver.

[40] *See also* n. 38, supra.

These provisions in the Prop 1B and Carl Moyer Program guidelines enable both the State and District to identify grantees that violate their contract provisions.

The EPA and citizens, in turn, can identify violators through the annual demonstration reports that the District is obligated under its SIP commitment to make publicly available (on the District's website) and to submit to the EPA by August 31 of each year. *See* SJVUAPCD Board Resolution No. 13-6-19 (June 20, 2013) at 3 and Rule 9610, Section 5.0. Specifically, Section 6.1 of Rule 9610 (as adopted June 2013)[41] states that "[a]ll documents created and/or used in implementing the requirements of Section 4.0 shall be kept and maintained as required by the applicable incentive program guidelines. . . [and] shall be made available for public review" consistent with the California Public Records Act and other related requirements. Section 6.1 also states that "[i]nformation regarding the process for the public review of such records shall be included in the annual demonstration report." Rule 9610, Section 6.1. Consistent with these requirements, the 2013 Annual Demonstration Report submitted by the District states that the public may request documents created and/or used in implementing the requirements of Section 4.0 (of Rule 9610) through the District's Public Records Release Request form, which is available on the District website. *See* SJVUAPCD, "2013 Annual Demonstration Report" (January 31, 2014) at 8. The District has confirmed that both the EPA and citizens may use this form to request copies of the required records for any Prop 1B or Carl Moyer Program project that the District has relied upon for SIP credit, which will be identified in the District's annual demonstration reports going forward. *See* e-mail dated December 18, 2013, from Jeannine

[41] All references to Rule 9610 herein are to the rule as adopted by the District on June 20, 2013.

Tackett, SJVUAPCD, to Idalia Perez, U.S. EPA Region 9, "RE: question needed for response to comments on contingency measure SIP."[42]

Fourth, the State maintains the ability to apply penalties and secure appropriate corrective actions where contract terms are violated, and the EPA maintains the ability to require appropriate corrective actions of the District where projected emission reductions are not achieved. For example, under the 2008 and 2010 Prop 1B guidelines, where the District finds that a grantee has violated a contract term, the District is authorized to recover all or a portion of program funds, assess fiscal penalties on equipment owners based on the severity of the non-performance, and prohibit the equipment owner from participating in future State incentive programs, among other things. *See* 2008 Prop 1B guidelines at Section IV.G ("Equipment Project Non-Performance") and 2010 Prop 1B guidelines at Section VI.I ("Equipment Project Non-Performance"). Under the 2011 Carl Moyer Program Guidelines, both CARB and the District are authorized to "seek any remedies available under the law for noncompliance with Carl Moyer Program requirements and nonperformance with the contract," including withholding of program funds, and should CARB determine that the District's oversight and

[42] In its December 18, 2013 e-mail, the District confirmed that it "will include information in future annual demonstration reports as necessary to ensure the ongoing tracking of projects claimed in prior annual demonstration reports, including adjustments necessary under Section 4.3 [of Rule 9610]." We note that beginning with the 2014 annual demonstration report, the District must identify the *specific projects* (by unique project identification number) that the District has relied upon for emission reduction credit in the Contingency Measure SIP, including adjustments made as required by Section 4.3 of Rule 9610, to ensure that the EPA and citizens can track the District's progress in satisfying its SIP commitments. *See* Rule 9610, Section 4.5; *see also* Proposal TSD at 27, n. 17. The District may satisfy this requirement by including, in its annual demonstration report, the list of specific projects in the attachments to the EPA's Proposal TSD (as adjusted consistent with Rule 9610, Section 4.3), which the EPA developed because the 2013 Annual Demonstration Report does not specifically identify the projects relied upon for credit in the Contingency Measure SIP. *See* Proposal TSD at Attachment A ("Prop 1B: On-Road Vehicle Replacement projects achieving emission reductions through 2015") and Attachment B ("Carl Moyer Program: Off-Road Vehicle Replacement projects achieving emission reductions through 2015").

enforcement of the program is insufficient, CARB may recapture funds granted to the District that have not yet been awarded to approved projects. *See* 2011 Carl Moyer Program Guidelines, Chapter 3 at Section U ("Program Non-Performance"). Additionally, as explained further below, the EPA maintains the ability to enforce the District's SIP commitments – i.e., to require the District to submit annual demonstration reports consistent with the requirements of Rule 9610 and/or to adopt and submit substitute measures on a fixed timeframe, where projected emission reductions are not achieved.

Fifth, citizens have access to all of the emissions-related information obtained from the source. As explained in our proposed rule, the Board commitments submitted with the Contingency Measure SIP obligate the District to "account for" its claimed NO_x and $PM_{2.5}$ emission reductions "in annual demonstration reports pursuant to the requirements of Rule 9610." *See* SJVUAPCD Board Resolution No. 13-6-18 at 3. Rule 9610 requires the District to submit to the EPA, no later than August 31 of each year, an "annual demonstration report" that includes detailed information about *each specific project* that the District has relied upon to achieve SIP-creditable emission reductions (e.g., unique project identification numbers, project implementation dates, applicable incentive program guideline(s), and quantified emission reductions per year and aggregated over the project life, by pollutant). *See* 78 FR 53113, 53121 (citing Rule 9610, sections 4.1 – 4.6 and 5.0) (emphases added). Additionally, Rule 9610 requires that "[a]ll documents created and/or used in implementing the requirements of Section 4.0 shall be kept and maintained as required by the applicable incentive program guidelines" and that "such records shall be made available for public review." Rule 9610, Section 6.1. Under the 2008 and 2010 Prop 1B guidelines, all grant recipients must, among other things, retain "all documents, invoices, and correspondence associated with the application, award, contract,

monitoring, enforcement, and reporting requirements" for at least two years after the equipment project contract term or three years after final payment, whichever is later"; must make records readily available and accessible to the District, CARB, or their designees upon request; and must submit regular reports to the District that include information about annual miles traveled, certification and documentation of travel within California's trade corridors, and certification that the project was operated in accordance with the signed contract. *See* 2008 Prop 1B guidelines, Appendix A ("Trucks Serving Ports and Intermodal Rail Yards"), Section C ("Recordkeeping Requirements") and Section D ("Annual Reporting Requirements") at A-4 and 2010 Prop 1B guidelines, Appendix A ("Heavy Duty Diesel Trucks"), Section F ("Recordkeeping Requirements") and Section G ("Annual Reporting Requirements") at A-19. The 2011 Carl Moyer Program Guidelines contain substantially similar recordkeeping and reporting requirements for grantees in Chapter 3, Section Z.9 ("Reporting"), Section Z.10 ("On-Site Inspections and Audits"), and Section DD ("Grantee Annual Reporting"). Pursuant to section 6.1 of Rule 9610, all of these documents must be made available for public review upon request.[43] *See* Rule 9610, Section 6.1.

[43] The 2008 Prop 1B guidelines require the District to retain all "program records" (e.g., invoices, contracts, and correspondence) for at least two years after the project ends or three years after final payment, whichever is later. *See* 2008 Prop 1B guidelines, Chapter II, Section D.10.b ("General Program provisions"). The 2010 Prop 1B guidelines require the District to retain "program records" for 35 years after the bond issuance date providing the funds for the grant, or to send all records to ARB by the end date of the grant agreement. *See* 2010 Prop 1B guidelines, Chapter II, Section E.10.b ("General Program provisions"). Under the Carl Moyer Program Guidelines, the District must keep each "project file" for a minimum of two years after the end of the contract term or a minimum of three years after final payment, whichever is later. *See* 2011 Carl Moyer Program Guidelines, Chapter 3, Section V ("ARB Audit of Air Districts") at 3-25. A "project file" generally includes a copy of the application, a completed pre- and post-inspection form, and the annual reports submitted by the grantee. *See id.* at Section X.6, Section AA.4, Section BB.1.(G), and Section DD.3.

Sixth, although citizens cannot file suits against *sources* for violations, both the EPA and citizens may file suits against the *District* for violations of its commitments to ensure that the projected emission reductions are achieved in 2015. Specifically, the SJVUAPCD Governing Board has submitted a commitment to quantify SIP-creditable emission reductions in the amount of 4.15 tpd of NO_x reductions and 0.10 tpd of $PM_{2.5}$ reductions using the incentive program guidelines and related documents identified in Rule 9610 and to "account for these NO_x and $PM_{2.5}$ emission reductions in annual demonstration reports pursuant to the requirements of Rule 9610" for purposes of satisfying the $PM_{2.5}$ contingency measure requirement for 2015. SJVUAPCD Board Resolution No. 13-6-18 at p. 3. Additionally, the Board's commitment states that "[if] there is a shortfall in expected emission reductions for 2015, the District will adopt and submit to EPA substitute rules and measures that will achieve equivalent emission reductions as expeditiously as practicable and no later than any applicable implementation deadline in the CAA or EPA's implementing regulations, by no later than December 31, 2016." *Id.* As explained in our proposed rule (78 FR 53113, 53121), the EPA interprets these District commitments as applying to emission reductions to be achieved in 2015 through specific types of Prop 1B and Carl Moyer Program projects,[44] and the EPA expects that the 2014 annual demonstration report will then specify the individual projects relied upon to achieve these emission reductions, consistent with the requirements of Rule 9610, Section 4.5. *See* Proposal TSD at 25-27, n. 13 and n. 17 (referencing Proposal TSD at Attachment A and Attachment B). These Board commitments, which become federally enforceable by the EPA and by citizens upon approval

[44] This interpretation is consistent with information in the District's 2013 Annual Demonstration Report, which identifies "agricultural off-road vehicle replacement projects funded through the Carl Moyer Program" and "on-road vehicle replacement projects funded through the Prop 1B program" as the projects relied upon for contingency measure purposes. *See* 2013 Annual Demonstration Report at 26 (Table 5).

into the SIP,[45] impose clear and specific requirements on the District to account for specific amounts of NO_x and $PM_{2.5}$ emission reductions through annual demonstration reports that satisfy the requirements of Rule 9610 and, if the identified projects fail to achieve the projected emission reductions in 2015, to adopt and submit to the EPA substitute measures that will achieve equivalent amounts of emission reductions as expeditiously as practicable and no later than December 5, 2015.[46] Should the EPA determine that the SJV area has failed to attain the 1997 $PM_{2.5}$ standards by the applicable attainment date (April 5, 2015), the EPA and citizens may enforce both components of the District's SIP commitment under sections 113 and 304 of the CAA, respectively, as follows: (1) if the Board fails to annually account for its claimed NO_x and $PM_{2.5}$ emission reductions consistent with the requirements of Rule 9610, the EPA or

[45] *See* notes 30 and 31, *supra.*

[46] Consistent with the EPA's longstanding interpretation of CAA section 172(c)(9) as requiring that all actions needed to effect full implementation of contingency measures occur within 60 days after the EPA notifies the State of a failure to attain the NAAQS by the applicable attainment date (78 FR 53113, 53115), we interpret the phrase "applicable implementation deadline" in the District's SIP commitment to mean 60 days after October 5, 2015, which is the latest date by which the EPA must determine whether the SJV area has attained the 1997 $PM_{2.5}$ NAAQS pursuant to CAA section 179(c). In our proposed rule, we stated that the District's commitment obligated it to adopt and submit any substitute measures necessary to correct a shortfall in emission reductions "no later than December 31, 2016" (78 FR 53113, 53121, 53122). In this final action, however, we are clarifying our interpretation of the SIP commitment to mean that any substitute measures necessary to correct a shortfall in 2015 emission reductions must be adopted and submitted to the EPA no later than the applicable implementation deadline for these contingency measures under CAA section 172(c)(9), which is December 5, 2015. This interpretation is consistent with the text of the District's SIP commitment, which states that in the event of a shortfall, the District will "adopt and submit to EPA substitute rules and measures that will achieve equivalent emission reductions as expeditiously as practicable and *no later than any applicable implementation deadline* in the CAA or EPA's implementing regulations, by no later than December 31, 2016." *See* SJVUAPCD Board Resolution No. 13-6-18 at p. 3 (emphases added). As a practical matter, because a December 2015 deadline for implementation of the remedy requires the District to begin developing any necessary substitute measures well before that date, the EPA intends to determine by late 2014 (based on the District's 2014 annual demonstration report and other available documentation) whether there will be any shortfall in projected emission reductions that triggers the District's obligation to adopt and submit substitute measures.

citizens may enforce the District's obligation to submit the required reports; and (2) if the District's 2014 annual demonstration report indicates that the specific projects identified therein will not achieve the District's claimed amounts of NO_x and $PM_{2.5}$ emission reductions (4.15 tpd of NO_x reductions and 0.10 tpd of $PM_{2.5}$ reductions) in 2015 as projected, the EPA or citizens may enforce the District's obligation to adopt and submit substitute measures that will achieve equivalent amounts of emission reductions by December 5, 2015. *See* Proposal TSD at 42-44. We find these provisions adequate to ensure that the EPA and citizens may secure appropriate corrective actions where projected emission reductions are not achieved.

Finally, the emission reductions to be achieved through the identified Prop 1B and Carl Moyer Program projects are practicably enforceable consistent with EPA policy on enforceability requirements. The EPA generally considers a requirement to be "practically enforceable" if it contains a clear statement as to applicability; specifies the standard that must be met; states compliance timeframes sufficient to meet the standard; specifies sufficient methods to determine compliance, including appropriate monitoring, record keeping and reporting provisions; and recognizes relevant enforcement consequences. *See* "Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency," September 3, 1987 ("1987 Potter Memo") and "Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and Section 112 Rules and General Permits," January 25, 1995 ("1995 PTE Policy") at 5, 6. The actions associated with the incentive-based emission reductions in the Contingency Measure SIP are practicably enforceable on two levels. First, as explained above, the actions required of *grantees* under the 2008 and 2010 Prop 1B guidelines and the 2011 Carl Moyer Program Guidelines are practicably enforceable by the State and District. Specifically, under the applicable portions of the Prop 1B and Carl Moyer Program guidelines

(*see* Proposal TSD at 29-42), each grant of incentive funds must be subject to contract provisions that clearly identify the funded equipment or vehicle; specify the actions required of the grantee; identify relevant compliance timeframes (e.g., a "project life"); specify sufficient methods to determine the grantee's compliance with contract provisions, including detailed monitoring, recordkeeping and reporting requirements; and identify potential enforcement consequences in cases of contract non-compliance. Taken together, these provisions of the 2008 and 2010 Prop 1B guidelines and the 2011 Carl Moyer Program Guidelines ensure that the actions required of grantees are practically enforceable consistent with EPA policy.

Second, the actions required of the *District* under its SIP commitment are practicably enforceable by the EPA and citizens. As discussed above, the District has submitted an enforceable commitment to account for specified amounts of NO_x and direct $PM_{2.5}$ emission reductions through annual demonstration reports meeting the requirements of Rule 9610 and, should the projects identified in those reports[47] fail to achieve the specified reductions in 2015, to adopt and submit substitute measures achieving equivalent amounts of reductions on a fixed schedule. This commitment clearly identifies the District as the responsible entity; specifies the requirement that must be met and the compliance timeframes (i.e., to account for specific amounts of incentive-based NO_x and $PM_{2.5}$ emission reductions or to adopt and submit substitute measures by fixed dates); and, through reference to the requirements of Rule 9610, specifies sufficient methods to determine compliance (i.e., the requirements under Section 4.0 of Rule 9610 that each annual demonstration report must satisfy). Should the District fail to submit annual demonstration reports meeting the requirements of Rule 9610 that confirm that its claimed NO_x and $PM_{2.5}$ emission reductions occurred in 2015 as projected, the EPA may make a

[47] *See* n. 42, *supra*.

finding of failure to implement the SIP under CAA section 179(a), which starts an 18-month period for the State/District to correct the non-implementation before mandatory sanctions are imposed. Additionally, the EPA or citizens may enforce the District's obligation to adopt and submit substitute measures that will achieve equivalent emission reductions no later than December 5, 2015.

Taking into account all of these provisions of the applicable incentive program guidelines and the District's SIP commitments, we find the incentive-based emission reductions relied upon in the Contingency Measure SIP to be practically enforceable consistent with EPA policy.

Comment 14: Earthjustice asserts that the incentive-based emission reductions are not independently verifiable because the EPA and citizens can only rely on data submitted to or collected by the District. Additionally, Earthjustice contends that the EPA has no authority to inspect sources for compliance with the contracts between the District and the source, and that the EPA also lacks the ability to apply penalties or secure corrective actions against the sources. Finally, Earthjustice asserts that because the emission reductions are secured through contracts between the source and the District, compliance with those agreements cannot be enforced by the public or the EPA, and that the District "has discretion to modify these contracts and redefine violations without any EPA or public oversight."

Response 14: First, we disagree with the commenter's claim that the incentive-based emission reductions are not independently verifiable. Although enforcement of these emission reductions by the EPA or citizens generally depends upon project-related information maintained by the District, this does not preclude independent verification of the emission reductions if sufficient safeguards are in place to ensure that the District will obtain and maintain adequate compliance-related records and make these records available to the EPA and the public. As discussed above,

the applicable incentive program guidelines (the 2008 and 2010 Prop 1B guidelines and the 2011 Carl Moyer Program Guidelines) require that the District maintain specific documentation of pre-project and post-project inspections for each funded project and that all grantees submit detailed compliance-related documentation to the District on an annual or biennial basis. The District, in turn, is obligated under its SIP commitment to make these project records available to the EPA and to the public upon request. *See* Response 13. Furthermore, as a result of the EPA's approval of the District's commitments into the SIP, the EPA may require under CAA section 114(a) that the District provide information necessary for the purpose of determining whether the District is in violation of these SIP commitments – including all compliance-related documentation that the District maintains in accordance with the applicable incentive program guidelines. *See* CAA section 114(a) (authorizing the EPA to require submission of information from "any person" who may have information necessary for the purpose of determining whether a SIP requirement has been violated) and section 302(e) (defining "person" to include a State or political subdivision thereof). We find the monitoring, recordkeeping and reporting requirements of the applicable incentive program guidelines, together with the District's enforceable SIP commitments, adequate to ensure that the incentive-based emission reductions can be independently verified.

Second, although the commenter correctly states that the EPA is not authorized to inspect sources for compliance with their funding contracts or to apply penalties or secure corrective actions against individual sources, we do not believe such authorities are necessary in order to enforce these emission reductions under the CAA. As discussed in Response 13 above, both the District and CARB are authorized to inspect sources for compliance with their funding contracts and to apply penalties or secure corrective actions against sources that violate their contracts.

Rule 9610 requires the District to maintain records of all such inspections and enforcement actions (*see* Rule 9610, Section 6.1), and under section 114(a) of the CAA, the EPA may require the District to provide these project-related records for purposes of determining whether the District is in violation of its SIP commitment. Both the EPA and citizens may also obtain these records from the District through submission of a "Public Records Release Request." *See* Response 13. Based on these project-related records, the EPA and citizens may verify whether the District has adequately accounted for 4.15 tpd of NO_x reductions and 0.10 tpd of $PM_{2.5}$ reductions in 2015, consistent with its SIP commitments. Additionally, where the documentation evidences a shortfall in the required emission reductions, the District would be obligated – subject to the EPA and citizen enforcement under the CAA – to adopt and submit substitute measures that achieve equivalent emission reductions no later than December 5, 2015. We find these provisions adequate to ensure that the incentive-based emission reductions in the Contingency Measure SIP may be enforced under the CAA.

Finally, although we agree with the commenter's claim that neither the EPA nor citizens can enforce compliance with the contracts between sources and the District, we disagree with the claim that the District has discretion to "redefine violations without any EPA or public oversight." As explained above, upon approval into the SIP the District's commitments become federally enforceable by the EPA and by citizens under sections 113 and 304 of the Act, respectively. *See* Response 13. These SIP-approved commitments cannot be modified, nor can the District "redefine violations" thereof, except through a SIP revision adopted by the State after reasonable notice and public hearing and approved by the EPA through notice-and-comment rulemaking. *See* CAA section 110(l); 5 U.S.C. section 553; 40 CFR 51.105; *see also* Response 8.

Comment 15: Earthjustice cites the EPA's 2001 EIP Guidance to support its assertion that to be enforceable, a "financial mechanism EIP" must meet the general programmatic and source-specific definitions of enforceable. Earthjustice asserts that the EPA's analysis does not include any review of the programmatic requirements outlined in EPA policy and that the Valley's incentive program "violates several of these criteria." Additionally, as to the "source-specific" definition of enforceable in EPA policy, Earthjustice asserts that the EPA lacks the ability to independently verify compliance because the EPA is reliant upon information collected by the State and District and cannot collect its own information, conduct inspections, demand additional reporting, or enforce the failure to submit required reports. Earthjustice further contends that the limited reporting required under the Carl Moyer program does not allow the EPA to independently verify compliance given "EPA must rely on the limited documentation submitted by the owner and will not even see reports on usage of the new equipment unless that data happens to be collected by the State or District and shared with EPA." Earthjustice concludes that the incentive program contingency measure thus fails to be "enforceable" either at the programmatic level or the source-specific level.

Response 15: We disagree with Earthjustice's characterization of the EPA's recommendations in the 2001 EIP Guidance. The EPA stated in the 2001 EIP Guidance that "[t[he emission reductions associated with a financial mechanism EIP are enforceable if they meet the general programmatic and source-specific definitions of enforceable." 2001 EIP Guidance at 120. Additionally, the EPA stated that although a program containing these elements would assure that the program would meet the applicable CAA provisions, the EPA would also evaluate programs submitted by states that do not contain all of these elements and would determine, through notice-and-comment rulemaking, whether such programs satisfied the applicable CAA

requirements. *See* 2001 EIP Guidance at 119; *see also* 2001 EIP Guidance at 12 and 19. Because the enforceability considerations highlighted in the 2001 EIP Guidance are non-binding recommendations, the EPA does not apply them as regulatory criteria in its evaluation of an EIP submission.

We have, however, evaluated the incentive-based emission reductions in the Contingency Measure SIP for consistency with the EPA's recommendations in the 2001 EIP Guidance and find them generally consistent with the general programmatic and source-specific definitions of "enforceable" in this document. As Earthjustice notes, the "programmatic" definition of enforceable highlights seven key factors that should be considered in determining whether an EIP is enforceable. *See* 2001 EIP Guidance at 35-36. We addressed each of these seven factors in Response 13 above. The "source-specific" definition of enforceable highlights three key factors that should be considered in determining whether an EIP is enforceable: (1) the source is liable for any violations; (2) the liable party is identifiable; and (3) the State, the public, and the EPA can independently verify a source's compliance. *See* 2001 EIP Guidance at 40. With respect to the first two factors (the source's liability for violations and the ability to identify the liable party), *see* Response 13 above. With respect to the third factor (the ability of the State, the public, and the EPA to independently verify a source's compliance), *see* Response 14 above.

We also disagree with Earthjustice's assertion that the EPA cannot collect the information necessary to independently verify compliance and that the reporting required under the Carl Moyer program does not allow the EPA to independently verify compliance. As discussed above, the applicable incentive program guidelines (the 2008 and 2010 Prop 1B guidelines and the 2011 Carl Moyer Program Guidelines) require that the District maintain specific documentation of pre-project and post-project inspections for each funded project and that all

grantees submit detailed compliance-related documentation to the District on an annual or biennial basis. The District, in turn, is obligated under its SIP commitment to maintain these project records and make them available to the EPA and to the public upon request. *See* Response 13; *see also* n. 43 *supra*. Furthermore, as a result of the EPA's approval of the District's commitments into the SIP, the EPA may require under CAA section 114(a) that the District provide information necessary for the purpose of determining whether the District is in violation of its SIP commitments – including all compliance-related documentation that the District maintains in accordance with the applicable incentive program guidelines. *See id.* and Response 14. We find these provisions adequate to ensure that the EPA can collect the information necessary to independently verify the District's compliance with its SIP commitments.

All SIP measures have some level of uncertainty, whether it comes from the uncertainty associated with the emissions factors for certain sources, the level of compliance with existing SIP measures, or the modeling for an attainment demonstration. The issue is how best to apply assumptions and tools to reduce the uncertainty to a manageable factor. *See* 2004 Electric-Sector EE/RE Guidance at 11. As explained in our Proposal TSD and further in these responses to comments, the incentive programs relied upon in the Contingency Measure SIP are subject to detailed monitoring, recordkeeping, reporting, and emissions quantification requirements under State law, all of which are designed to ensure that program grants are used to reduce air pollution through the replacement of older, higher-polluting vehicles and equipment with newer, cleaner vehicles and equipment and to ensure that the resulting emission reductions are calculated consistent with established quantification protocols. *See* Proposal TSD at 29-42; *see also* Response 13. We find these requirements of the Prop 1B program and Carl Moyer Program

adequate to reduce the uncertainties in calculating associated emission reductions to a manageable factor and to provide a reasonable basis for approval of the incentive-based emission reductions in the Contingency Measure SIP.

***Comment 16*:** The District notes that the EPA did not review emission reductions achieved through the National Resources Conservation Service Environmental Quality Incentives Program (NRCS EQIP) for the replacement of agricultural equipment (as included in Rule 9610 and documented through the District's *2013 Annual Demonstration Report*). It describes efforts that have been taken toward developing procedures for crediting these emission reductions for SIP purposes including the statement of principles agreed upon by the District, NRCS, EPA, and CARB in December 2010[48] and the document signed by the EPA and NRCS in July 2012.[49] The District states that the agencies that signed these statements agreed to work collaboratively to develop a mechanism to provide SIP credit for emission reductions from federal, state, and local incentive programs that meet the EPA integrity principles of being surplus, quantifiable, enforceable, and permanent. The District comments that it appreciates the EPA's efforts over the last several years in reviewing the NRCS EQIP Program in the context of these agreements and Rule 9610 and looks forward to the EPA's approval of this program as SIP-creditable in the near future.

***Response 16*:** We did not evaluate the EQIP as part of our action on the Contingency Measure SIP because the District did not specifically identify any emission reductions from the EQIP as part of its contingency measure plan and because emission reductions from the Carl Moyer and

[48] SJVAPCD, EPA, US Department of Agriculture NRCS, and CARB; *Statement of Principles Regarding the Approach to State Implementation Plan Creditability of Agricultural Equipment Replacement Incentive Programs Implemented by the USDA Natural Resources Conservation Service and the San Joaquin Valley Air Pollution Control District*, December 2010.
[49] USDA and EPA, *Implementation Principles for Addressing Agricultural Equipment under the Clean Air Act,* July 26, 2012

Prop 1B projects identified in our proposed rule and the Proposal TSD provide sufficient emission reductions to meet the CAA contingency measure requirement for the 1997 $PM_{2.5}$ NAAQS in the SJV. *See* Contingency Measure SIP at 7-9 and 2013 Annual Demonstration Report at Table 5; *see also* Proposal TSD at 25-27, n. 13 and n. 17. Comments regarding the EQIP program are therefore outside the scope of this action.

***Comment 17*:** Citing the EPA's discussion of voluntary and discretionary economic incentive programs in the proposed rule, the District states that the EPA has generally limited the amount of emission reduction credit allowed in a SIP for discretionary incentive programs to three percent of the total projected future year emission reductions required to attain the relevant NAAQS. The District states that "[t]his three percent cap does not affect this contingency measure demonstration and should be removed from the proposed rule, since EPA notes the amount of incentive-based emission reductions used in this contingency demonstration is less than two percent of the total projected emission reductions needed to attain the 1997 $PM_{2.5}$ NAAQS in the Valley." It further asserts that "the District should not be limited to a three percent limit for incentive-based reductions achieved through SIP-creditable processes, such as Rule 9610." In support of these assertions, the District quotes from the EPA's stated rationale in the 2001 EIP Guidance (at pg. 139) for the recommended 3 percent cap on SIP credit for voluntary programs and the EPA's statement that states "may use the EIP guidance to implement programs which will generate emission reductions beyond the 3 percent limit, or when [the state has] already reached the 3 percent limit under the voluntary measures guidance." Finally, the District notes that the 2001 EIP Guidance sets forth only non-binding policy and does not represent final EPA action on the requirements for EIPs.

Response 17: With respect to voluntary mobile source emission reduction programs (VMEPs), the EPA has generally limited the amount of emission reductions allowed in a SIP to three percent (3%) of the total projected future year emission reductions required to attain the relevant NAAQS, and for any particular SIP submittal to demonstrate attainment or maintenance of the NAAQS or progress toward attainment (RFP), 3% of the specific statutory requirement. *See* 1997 VMEP at 5. Similarly, with respect to voluntary and emerging measures for stationary sources, the EPA has generally limited the amount of emission reductions allowed in a SIP to 6% of the total amount of emission reductions required for RFP, attainment, or maintenance demonstration purposes. *See* 2004 Emerging and Voluntary Measures Policy at 9 and 2005 Bundled Measures Guidance at 8. These limits are "presumptive" in that the EPA may approve emission reductions from voluntary or other nontraditional measures in excess of the presumptive limits where the State provides a clear and convincing justification for such higher amounts, which the EPA would review on a case-by-case basis. *See id.; see also* Response 12.

It appears the District may have misunderstood the EPA's intent in discussing this presumptive 3% limit on the emission reduction credit allowed in a SIP for VMEPs. In the proposed rule (78 FR 53113, 53118), we discussed the presumptive 3% limit both to provide context on the applicable EPA guidance to date and to indicate that the incentive-based emission reductions in the Contingency Measure SIP adequately address the EPA's recommendations in the 1997 VMEP, as applicable (78 FR 53113, 53118 and 53121). Our proposed rule made clear, however, that we were evaluating the Contingency Measure SIP in accordance with the fundamental integrity elements identified in several EPA guidance documents, as applied not only to VMEPs but also to discretionary "financial mechanism EIPs." *See id.* at 53118 (citing both 2001 EIP Guidance and 1997 VMEP). Although we observed in the proposed rule that the

NO_x and direct $PM_{2.5}$ emission reductions attributed to Carl Moyer Program and Prop 1B projects in the Contingency Measure SIP each amounted to less than 2 percent of the total projected emission reductions needed to attain the 1997 $PM_{2.5}$ NAAQS in the SJV (78 FR 53113, 53121), this factual observation was intended to provide additional support for our proposal and was not a necessary basis for our action. *See* Response 12. Our discussion of the presumptive 3% limit provides relevant context on the EPA's guidance on voluntary and incentive programs to date, and we disagree with the District's statement that this discussion should be excluded from the analyses supporting our rulemaking action.

We agree, however, with the District's suggestion that it is not necessarily limited to a 3% cap on the amount of SIP emission reduction credit allowed for incentive programs. As the District correctly notes, the 2001 EIP Guidance sets forth only non-binding policy and does not represent final EPA action on the requirements for EIPs. *See* 2001 EIP Guidance at 12. Likewise, the presumptive 3% limit on the SIP credit allowed for a VMEP under the 1997 VMEP policy is also a non-binding policy recommendation. In addition, the 2001 EIP Guidance explicitly provides that states may use it to implement programs which will generate emission reductions beyond the 3 percent limit, provided the state is directly responsible for ensuring that program elements are implemented. *See* 2001 EIP Guidance at 139. The EPA will review each SIP submitted by California that relies on emission reductions from incentive programs on a case-by-case basis in accordance with the applicable CAA requirements and, for any SIP that relies on incentive programs for emission reductions exceeding the EPA's presumptive caps, the EPA will determine through notice-and-comment rulemaking whether the State has provided adequate justification for such higher amounts and whether the submission, as a whole, satisfies the requirements of the Act. Because the incentive-based emission reductions in the Contingency

Measure SIP fall below the EPA's recommended 3% limit, we do not need to decide in today's action whether the State has provided adequate justification for higher amounts of emission reduction credit.

***Comment 18*:** The District disagrees in part with the EPA's description of the effect of a "case-by-case determination" under the Carl Moyer Program and with the EPA's statement that such determinations give the State broad discretion without EPA oversight or public process. First, the District states that case-by-case determinations are defined under Rule 9610 as "alternative procedures approved by ARB for specific projects, as authorized under the Carl Moyer Program Guidelines" and that these are not limited to "determinations that provide for a longer project life." Second, the District states that "all case-by-case determinations submitted for review to ARB are made available to the public via public web posting at ARB's Carl Moyer Program website, and [that] the District is required by the Carl Moyer Program Guidelines to keep a copy of the determination in the project file." Third, the District states that under Section 3.2.2 of Rule 9610, no case-by-case determination may be used to quantify emission reductions under the rule unless each determination is reviewed through a public process and submitted to the EPA in accordance with Section 7.0. Finally, the District confirms the EPA's understanding that emission reductions from projects subject to case-by-case determinations are *not* included in the 2013 Annual Demonstration Report but disagrees with the EPA's statement in the proposed rule that such projects "are not eligible for SIP credit," noting that the reason these are not included in the 2013 Annual Demonstration Report is that they are "extremely rare and make up less than one percent of District administered incentive programs." In conclusion, the District maintains that case-by-case determinations made in accordance with Rule 9610 should be eligible for SIP credit.

Response 18: We do not dispute the District's statement that "case-by-case determinations" under the Carl Moyer Program are not limited to determinations that allow for a longer project life and note the broad definition of the term "case-by-case determination" in Section 2.4 of Rule 9610. We discussed case-by-case determinations in the proposed rule only to note that, although the portions of the three incentive program guidelines that we reviewed generally establish criteria consistent with the requirements of the Act, the provisions regarding case-by-case determinations in these portions of the guidelines do not adequately address the Act's requirements for SIP emission reduction credit (78 FR 53113, 53120). We referenced, as an example, a provision in the 2011 Carl Moyer Program guideline entitled "Project Life" and noted that emission reductions from any project subject to a case-by-case determination under such a provision would not be eligible for SIP credit "unless the District submits the individual determination for EPA review and approval through the SIP process" (78 FR 53113, 53120 (referencing 2011 Carl Moyer Program guideline at Chapter 9, Section C.1(c)(5)). The purpose of this discussion was to make clear that the EPA is not, through this rulemaking, authorizing the District to rely on any project subject to a case-by-case determination under the referenced incentive program guidelines, nor is the EPA approving any such case-by-case determination.

As the District correctly notes, Rule 9610 specifically prohibits the District from using a case-by-case determination to quantify emission reductions under the rule "unless such determination is reviewed through a public process and submitted to EPA in accordance with Section 7.0." Rule 9610, Section 3.2.2. Section 7.0 of the rule states, in relevant part, that "[e]ach SIP submission in which the District relies on [projections of SIP-creditable emission reductions] shall contain a demonstration that the applicable incentive program guideline(s) continues to provide for SIP-creditable emission reductions…." Read together, these provisions require the

District to submit any case-by-case determination that it intends to rely on for SIP credit to the EPA in a formal SIP submission, together with a demonstration that the determination and the project(s) subject to it provide for emission reductions that are surplus, quantifiable, enforceable, and permanent. *See* Rule 9610, Section 7.0 (establishing requirements for SIP submissions) and Section 2.25 (defining "SIP-Creditable Emission Reduction"). Upon the EPA's approval of such a SIP consistent with CAA requirements, projects subject to the identified case-by-case determination would be eligible for SIP credit.

In sum, case-by-case determinations under the Carl Moyer Program are not *currently* eligible for SIP credit but may become eligible for credit through the EPA's approval of SIP submissions going forward. Should the District intend to rely on emission reductions from a project subject to a case-by-case determination to satisfy a SIP requirement, it may do so only following its submission of the determination to the EPA as part of a SIP that meets the requirements of Rule 9610, Section 7.0 and the EPA's approval of such SIP consistent with the requirements of the CAA.

The EPA appreciates the District's statement confirming that projects subject to case-by-case determinations are not included in the 2013 Annual Demonstration Report and is approving the incentive-based emission reductions in the Contingency Measure SIP based on our understanding that it does not rely on any case-by-case determination.

C. General Comments

Comment 19: Earthjustice urges the EPA not to approve the San Joaquin Valley contingency measures for the San Joaquin Valley's $PM_{2.5}$ SIP. Earthjustice argues that the Contingency Measure SIP "does not comply with the Clean Air Act and would leave Valley residents without

meaningful air quality protections if and when the Valley fails to attain the 1997 $PM_{2.5}$ standards."

Response 19: For the reasons discussed in our proposed rule and further explained in our responses to comments above, we have determined that the Contingency Measure SIP corrects the deficiency that prompted our partial disapproval of the SJV $PM_{2.5}$ SIP and strengthens the SIP and are, therefore, approving it into the California SIP.

We disagree with the claim that the approval of this Contingency Measure SIP would leave SJV residents "without meaningful air quality protections" should the SJV fail to meet the 1997 $PM_{2.5}$ standards by the applicable attainment date of April 5, 2015. The Contingency Measure SIP demonstrates that California has adopted measures that will achieve substantial emission reductions in and after 2015 that will provide significant on-going air quality benefits to SJV residents. Specifically, the Contingency Measure SIP shows that in calendar year 2015, adopted and implemented federal and State mobile source control measures will reduce NO_x emissions by 21 tpd; State and local incentive grant funds will reduce NO_x emissions by an additional 4.15 tpd; and the SIP-approved contingency provision in the District's residential woodburning rule, Rule 4901, will provide 3.1 tpd of direct $PM_{2.5}$ reductions should we determine that the SJV has failed to attain the 1997 $PM_{2.5}$ standards by the applicable attainment date of April 5, 2015 (78 FR 53113, 53123). Compared to projected 2014 levels of NO_x and direct $PM_{2.5}$ emissions in the SJV, these contingency measures will provide an additional 9 percent reduction in NO_x emissions and an additional 5 percent reduction in direct $PM_{2.5}$ emissions in 2015.[50]

Comment 20*:* Earthjustice objects to the EPA's statement that contingency measures must be implemented "quickly without *significant* additional action by the state," stating that the addition

[50] Total NO_x and direct $PM_{2.5}$ emissions in the SJV are projected to be 291 tpd and 63.3 tpd, respectively, in 2014. *See* 2011 Progress Report, Appendix C, Table C-1.

of "significant" in 40 CFR 51.1012 was the result of a scrivener's error and is not consistent with the plain statutory language of CAA section 172(c)(9). Quoting from the preamble to the EPA's 2007 $PM_{2.5}$ Implementation Rule, Earthjustice notes that the EPA acknowledged this error in its adoption of the rule.

Response 20: We agree that the inclusion of "significant" in 40 CFR 51.1012 was in error and note the correction.

Comment 21: Mr. Unger comments that the SJV area has not met the $PM_{2.5}$ standards and that air quality has not improved much in the past few years. He also states that both the SJV's citizens and the District are reluctant to do more to improve air quality. For these reasons, he urges the EPA to not approve the SIP for the 1997 annual and 24-hour $PM_{2.5}$ standards. He disagrees with our statement that "the State has most likely done all it can to correct the deficiency" given the continuing nonattainment in the San Joaquin Valley. He states that if the EPA were to impose sanctions on the SJV, it would encourage California to adopt controls sufficient to attain the standards. He includes a list of suggested measures in his comments.

Response 21: In 2011, we approved all but one element of California's SIP to attain the 1997 annual and 24-hour $PM_{2.5}$ standards in the SJV (76 FR 69896, November 9, 2011). Our action here is to approve the last outstanding element of that SIP, the contingency measures for failure to make RFP or attain. Our approval is based on our determination that the Contingency Measure SIP corrects the deficiency that prompted our 2011 disapproval of the contingency measure provisions in the SJV $PM_{2.5}$ SIP. Although the commenter asserts generally that SJV citizens and the District are "reluctant" to do more to improve air quality, that the SJV area has not complied with the NAAQS for many years, and that the threat of sanctions might encourage further

regulatory action, the commenter fails to identify any specific basis under the CAA for disapproving the Contingency Measure SIP.

The purpose of contingency measures is to continue progress in reducing emissions while the SIP is being revised to meet a missed RFP milestone or correct continuing nonattainment. Should the EPA determine that the SJV has failed to attain the 1997 standards by the applicable attainment date (April 5, 2015), the State and District will be required to implement these contingency measures and to revise the SIP to assure expeditious attainment consistent with applicable CAA requirements.

We appreciate the list of control measures and will forward it to the District for its consideration during development of the next $PM_{2.5}$ SIP for the Valley.

III. Final Actions

The EPA is approving the Contingency Measure SIP (adopted June 20, 2013 and submitted July 3, 2013) based on the Agency's conclusion that this SIP submission corrects the deficiency in the CAA section 172(c)(9) attainment contingency measures that was one of two bases for the EPA's partial disapproval of the SJV $PM_{2.5}$ SIP on November 9, 2011 (76 FR 69896).

The EPA also finds that the CAA section 172(c)(9) RFP contingency measure requirement for the 2012 RFP milestone year is moot as applied to the SJV nonattainment area because the area has achieved its SIP-approved emission reduction benchmarks for the 2012 RFP milestone year. This finding corrects the deficiency in the CAA section 172(c)(9) RFP contingency measures that was the second of two bases for the EPA's partial disapproval of the SJV $PM_{2.5}$ SIP on November 9, 2011 (76 FR 69896).

Finally, the EPA is approving enforceable commitments by the District to monitor, assess, and report on actual NO_x and direct $PM_{2.5}$ emission reductions achieved through its

implementation of specific Prop 1B and Carl Moyer Program grants and to remedy any identified emission reduction shortfall in a timely manner as found on page 3 of the SJVUPACD Governing Board Resolution No. 13-6-18, dated June 20, 2013.

Today's final actions lift the CAA section 179(b)(2) offset sanctions and terminate the CAA section 179(b)(1) highway funding sanction clock triggered by the 2011 partial disapproval of the SJV $PM_{2.5}$ SIP. These actions also terminate the EPA's obligation under CAA section 110(c) to promulgate a corrective Federal implementation plan within two years of the partial disapproval.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it does not apply in Indian country located in the State, and the EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The

EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (*see* section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Incorporation by reference, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

AUTHORITY: 42 U.S.C. 7401 *et seq.*

Dated: April 28, 2014.

Jared Blumenfeld,
Regional Administrator,
Region IX.

40 CFR part 52 is amended as follows:

PART 52 APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS.

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F — California

2. Section 52.220 is amended by adding paragraph (c)(438) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(438) The following plan was submitted on July 3, 2013, by the Governor's Designee.

(i) [Reserved]

(ii) Additional materials.

(A) San Joaquin Valley Unified Air Pollution Control District.

(*1*) "Quantifying Contingency Reductions for the *2008 $PM_{2.5}$ Plan*" (dated June 20, 2013), adopted October 7, 2011.

(*2*) SJVUAPCD Governing Board Resolution No. 13-6-18, dated June 20, 2013, "In the Matter of: Authorizing Submittal of the 'Quantification of Contingency Reductions for the 2008 $PM_{2.5}$ Plan' to EPA."

(*3*) *Electronic mail*, dated July 24, 2013, from Samir Sheikh, SJVUAPCD, to Kerry Drake, EPA Region 9, "RE: Per our conversation earlier."

(B) State of California Air Resources Board.

(*1*) CARB Executive Order 13-30, dated June 27, 2013, "San Joaquin Valley $PM_{2.5}$ Contingency Measures Update."

[FR Doc. 2014-11681 Filed 05/21/2014 at 8:45 am; Publication Date: 05/22/2014]